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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1005

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellant,

v.

LEROY PAYNE,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF MICHIGAN

BRIEF OF ~~APPELLEE~~ RESPONDENT

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BRIEF OF APPELLEE

OPINIONS BELOW

People v. Payne, 386 Mich. 84, 191 N.W.2d 375 (1971), and *People v. Payne*, 18 Mich. App. 42, 170 N.W.2d 523 (1969).

JURISDICTION

Jurisdiction was invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Appellee accepts Appellant's statement of the Constitutional provisions involved.

QUESTIONS PRESENTED

1. Should *North Carolina v. Pearce* be applied retroactively when the majority of jurisdictions considering the question have done so and when all the criteria have been met for retroactive application?

2. Assuming *Pearce* is applied retroactively should the Michigan Supreme Court's finding that there was not sufficient conduct to justify the increased sentence be affirmed?

3. Assuming *Pearce* is found not applicable to this case should this case be remanded to the Michigan Supreme Court for a determination of whether Appellee-Payne's due process rights had been violated under the Michigan Constitution when this issue was not treated by the Michigan Supreme Court and when the reasons submitted for the increased sentence were factually and legally incorrect?

STATEMENT OF THE CASE

Defendant-Appellee, Leroy Payne accepts the Plaintiff-Appellant's statement of the case, but for purposes of clarity would add the following. The Appellant strongly claims that there was conduct of Leroy Payne known to the second sentencing judge, Berrien County Circuit Judge Chester J. Byrns, not known by the first sentencing judge, Berrien County Circuit Judge Philip A. Hadsell. In the first affidavit of Judge Byrns dated May 10, 1971, justifying the increased sentence

given Payne (Appendix "F", p. 68, 70 of Petition for Certiorari, hereinafter P.C.), paragraphs 5, 6, 9, 11, 12, 13 and 14 directly stated that the reason he imposed the increased sentence was partially due to the fact that:

> "During said trial I had the opportunity, which Judge Hadsell did not, to observe defendant for three days and, far more important, to hear many more of the details of the crime and Mr. Payne's participation in it than Judge Hadsell who, as the arraignment transcript shows, had only inquired of defendant whether the defendant committed the assault against Officer Yost with a gun with intent to kill and murder, to which Mr. Payne answered only 'yes'." (P.C. p. 68).

However, one month before his sentencing by Judge Hadsell, Payne testified at the trial of Lionel Bradford, his alleged partner in the shootings. At that trial, unlike Payne's trial, *both* wounded officers, Victor Yost and Charles Plummer, as well as Officer Plummer's treating surgeon, testified (2bff., 6bff., 9bff., 41bff.)* Judge Hadsell presided at this trial. At the sentencing of Payne, Judge Hadsell stated "I have a very comprehensive report from the probation department relative to your case. I heard your testimony in the case of People v. Lionel Bradford. I have, I think, all the facts that I need in mind." (P.C. 59).

Further, in paragraph "6" of his affidavit, Judge Byrns expressed the opinion that Payne no longer had remorse since he had said "nothing" at his second sentencing (P.C.

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*"2b" etc. refers to the transcript of the trial of Lionel Bradford, portions of which are Appendix B of this brief. The case is currently pending in the 6th Circuit Court of Appeals, *Bradford v. Johnson*, Case No. 72-1905.

69). However, the transcript of the second sentencing, before Judge Byrns, reveals Payne's attorney exercised the right to allocution: "The Court: Mr. Brown, you have spent some time with me arguing very eloquently and ably on behalf of your client towards mitigation of sentence." (P.C. 62). Further, Judge Hadsell had taken into account the possibility that Payne might lose his sense of remorse when Judge Hadsell said at the first sentencing "The sentence that I am about to impose on you will give you hope of returning to society after a—what I consider a reasonable length of time, providing that you are honestly desirous of reformation . . ." (P.C. 61).

Judge Byrns has submitted in this Court for the first time, an unsolicited second affidavit, dated November 29, 1972. This affidavit was submitted, according to its terms, once Judge Byrns became aware that Judge Hadsell had an opportunity to see Payne testify at Bradford's trial. (Appellant's Brief on Appeal, p. 43). In paragraph 4 of that affidavit, Judge Byrns states that a supplemental pre-sentence report was prepared but that he is not allowed under Michigan law to make it public. On December 18, 1972, Appellee Payne made a motion for production of that report and cited two Michigan cases which allow that report to be released at the Judge's discretion. Judge Byrns denied production of that report. In so denying the Appellee access to that report he stated:

> "This court has followed a policy generally in sentencing to tell the defendant exactly what it is in the pre-sentence report that has influenced him to give the defendant the opportunity to explain or to correct." (3a, Transcript of Hearing on Appellee's Motion for Production of Pre-Sentence Report, which appears in Appendix A of this Brief.)

In following his general policy, Circuit Judge Byrns made no mention of anything contained in the supplemental pre-sentence report upon which he relied when he increased Payne's sentence.

Further, it should be added on the procedural statement of facts that the issue of the increased sentence was pending on appeal in the Michigan Court of Appeals when *North Carolina v. Pearce* was released (P.C. 41-55) on the basis of prior Michigan law.

SUMMARY OF ARGUMENT

One of the major issues this case presents is whether *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), should be applied retroactively. When considering the criteria enunciated in inter alia, *Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965), to determine the degree and propriety of retroactive application, it is clear that *Pearce* should be given full retroactive effect.

First, the vast majority of state and federal courts considering the question have explicitly or implicitly applied *Pearce* retroactively. Therefore, the majority of jurisdictions have held retroactive application of *Pearce* would place a minimal burden on *their* administration of justice. Second, because there was not a set rule prior to the release of *Pearce* and because this Court has long recognized that "avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts [cite omitted]," *Pearce, supra*, 395 U.S. at 724, there is no support for a claim of detrimental reliance on the part of lower courts. Third, the purpose of *Pearce*, it should be noted, was to insure full unfettered access to the courts by defendants

and to prevent those who have appealed from being punished for the exercise of a constitutional right. Moreover, since retroactive application does not create the problems of loss of evidence and witnesses as might a re-trial, it is clear that retroactive application will serve the purpose of *Pearce* without burdening the administration of justice. Fourth and finally, the issue here under consideration was raised on appeal in Michigan on the date *Pearce* was released. *People v. Payne,* 18 Mich. App. 42, 46 (1969).

Applying *Pearce* to this case, the record below indicates there was *no* conduct of Appellee Payne before or after his first sentence which can justify his increased sentence. The second sentencing judge has claimed, as justification for the increase, that he saw Payne at a trial and heard all the brutal facts of the crime. He claims this is information that the first sentencing judge did not have because he had only taken a plea from Payne.

The second sentencing judge's claim can hardly be said to amount to finding subsequent conduct under *Pearce* standards, but more importantly, the claim is factually incorrect. The first sentencing judge not only took Payne's plea but, in addition, sat at a trial of Payne's alleged partner in the crime before he sentenced Payne. Payne testified at that trial along with witnesses who did not appear at Payne's trial 4 years later. Therefore, the first sentencing judge knew as much as, if not more than, the second sentencing judge about Payne and the crime.

The second sentencing judge also implied that he increased Payne's sentence because Payne had perjured himself and because he did not show any remorse. Again, the judge's reasons are legally insufficient and factually incorrect. The implication that Payne perjured himself is

a total rationalization. The judge who implied that Payne perjured himself was the very judge who vacated Payne's plea and suppressed his confession because it had been brutally beaten out of him. No one contests that fact. Therefore to allow a judge to allege perjury under these circumstances would create a charge easily levelled at any defendant who testifies at his own trial after vacating a prior plea of guilty.

The final allegation on which the increase was based is lack of remorse. In the instant case, the second sentencing judge acknowledged on the record that Payne's counsel had argued very eloquently for Payne in chambers. To now state that there was no showing of remorse because a defendant such as Payne fully utilized his counsel for allocution is patently absurd.

It is therefore apparent that the increased sentence in this case was based on a complete rationalization which flies in the face of the real and practical impact the sentence had. The second judge punished Payne for appealing. The judge admitted Payne's conduct in prison since the first sentence was exemplary. What the judge did not state and cannot state is even one valid reason for Payne's increased sentence. Under such circumstances, judicial vindictiveness is the only explanation.

Finally, if this Court finds that for any reason *Pearce* does not apply to this case, the case should be remanded to the State of Michigan for further proceedings because of prior Michigan case law and because of the Michigan Supreme Court's specifically avoiding a determination of whether there were independent state grounds for the *Payne* decision.

I.

NORTH CAROLINA v. PEARCE SHOULD BE APPLIED RETROACTIVELY TO DECIDE THIS CASE.

One of the main issues to be decided by this case is whether the rule enunciated in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), which limits the circumstances under which an increased sentence can be given following reconviction should be applied retroactively.

In *Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965), this Court cited the major factors to consider in determining whether retroactive application should be given a decision of this Court. It was there stated and subsequently followed in other cases [e.g., *Desist v. United States*, 395 U.S. 244, 22 L.Ed.2d 248, 89 S.Ct. 1030 (1969), and *Williams v. United States*, 401 U.S. 646, 28 L.Ed.2d 388, 91 S.Ct. 1148 (1971)] that retroactively must be determined by looking to the purpose of the rule, whether there was reliance placed on a prior set rule, and by examining the effect on the administration of justice of retrospective application. (381 U.S. at 336).

A further criterion mentioned in *Linkletter, supra*, and in *inter alia, Carafas v. Lavalle*, 391 U.S. 234, 20 L.Ed.2d 554, 88 S.Ct. 1556 (1968), is whether the issue was pending on appeal at the time the lead case was released.

When considering the above criteria, it is clear *Pearce* should be applied to decide this case. First, the vast majority of state and federal courts considering the question have explicitly or implicitly applied *Pearce* retroactively. Therefore, the majority of jurisdictions have held retroactive application of *Pearce* would place a

minimal burden on *their* administration of justice. Second, because there was not a set rule prior to the release of *Pearce* and because this Court has long recognized that "avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts [cite omitted]", *Pearce, supra,* 395 U.S. at 724, there is no support for a claim of detrimental reliance on the part of lower courts. Third, the purpose of *Pearce,* it should be noted, was to insure full unfettered access to the courts by defendants. Moreover, since retroactive application does not create the problems of loss of evidence and witnesses as might a re-trial, it is clear that retroactive application will serve the purpose of *Pearce* without burdening the administration of justice. Fourth and finally, the issue here under consideration was raised on appeal in Michigan on the date *Pearce* was released. *People v. Payne,* 18 Mich. App. 42, 46 (1969).

A. Retroactive Application of *Pearce* Would Place a Minimal Burden on the Administration of Justice.

State and federal courts which have considered the retroactivity of *Pearce* have overwhelmingly held it retroactive as to increased sentences following reconviction. Whatever burdens a resentencing might place on the administration of justice have been considered *de minimus* when compared to the purpose of the *Pearce* ruling. See, for example, *Commonwealth v. Allen,* 443 Pa. 96, 277 A.2d 803 (1971). It should be noted that not all situations involving an increased sentence following appeal and reconviction have been held controlled by the *Pearce* rationale. *Colton v. Kentucky,* ___ U.S. ___; 32

L.Ed.2d 584; 92 S.Ct. ___ (1972). Accord: *People v. Olary*, 382 Mich. 559, 170 N.W.2d 842 (1969). Those states which, contra to *Olary*, have held *Pearce* applicable to a trial *de novo* situation appear in footnote 4, *infra*.

A more detailed delineation of the state and federal decisions which have applied *Pearce* retroactively makes apparent that those jurisdictions have determined that retroactive application of *Pearce* would have a *de minimus* effect on their administration of justice.

1. *The Majority of State Jurisdictions Which Have Faced the Question Have Applied Pearce Retroactively.*

The question of the constitutional validity of harsher sentences upon reconviction has arisen in three contexts: sentences imposed by a judge, those governed largely by statutory standards, and those which are imposed by a jury.[1]

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[1] It should be noted that at least 19 states have a combination of judge or jury sentencing depending on the gravity or nature of the offense or whenever the death penalty might have been inflicted: Nine states give a general sentencing power to juries in noncapital cases: Arkansas, Ark, Stat. Ann. §43-2306, (1964); Georgia, Ga. Code Ann. §27-2502 (Supp. 1969); Indiana, Ind. Ann. Stat. §9-1819 (1956); Kentucky, Ky. R. Crim. P. 9.84; Missouri, Mo. Rev. Stat. §546.410 (1953); Oklahoma, Okla. Stat. Ann. tit. 22, §926 (1958); Tennessee, Tenn. Code Ann. §40-2707 (1955); Texas, Tex. Code Crim. Proc. art. 37.07 (Supp. 1969); Virginia, Va. Code Ann. §19.1-291 (1960). Three states give the jury sentencing power in specific cases: Alabama, Ala. Code tit. 14, §§318, 322, 336, 344, 355, 395, 409 (1958) (various offenses); Mississippi, Miss. Code Ann. §§2359, 2361 (Supp. 1968) (rape); North Dakota, N.D. Cent. Code §12-06-05 (1960). Jury used when death penalty might have been imposed: Ill. Ann. Stat. ch. 38, §1-7(c) (Smith-Hurd Supp. 1970); Md. Ann. Code art. 27, §413

a. Judge Sentencing

Thirty-seven (37) states have considered *Pearce* as it applies to judicial determination of sentencing. Of those, six (6) states have held it retroactive as it applies to sentencing credit.[2] Thirteen (13) out of fifteen (15) states applying *Pearce* to increased sentences have explicitly or implicitly held it retroactive where applicable to judicially imposed sentences after a retrial.[3] Six (6) out

(1967); Ohio Rev. Code Ann. §2901.01 (Page 1953); Pa. Stat. tit. 18, §4701 (1963). Separate Hearing used to determine penalty in capital cases; Cal. Penal Code §190.1 (West Cum. Supp. 1968); Conn. Gen. Stat. Ann. §53-10 (Supp. 1970); N.Y. Penal Law §125.35 (McKinney 1967); Pa. Stat. tit. 18, §4701 (1963).

[2] *PEARCE* HELD RETROACTIVE AS TO SENTENCE CREDIT

Arizona:	*State v. Johnson*, 105 Ariz. 21, 458 P.2d 955 (1969).
Hawaii:	*Wong v. Among*, 52 Hawaii 420, 477 P.2d 630 (1970).
Louisiana:	*State v. Williams*, 264 So.2d 638 (La, 1972)
Missouri:	*State v. Carter*, 443 S.W.2d 176 (Mo. 1969)
Nevada:	*Ibsen v. Warden*, 86 Nev. 540, 471 P.2d 229 (1970)
Texas:	*Ex Parte Ferrell*, 445 S.W.2d 729 (Tex. Cr.)

[3] *PEARCE* HELD RETROACTIVE AND APPLICABLE TO JUDGE RESENTENCING

Alabama:	*McMurtrey v. State*, 46 Ala. App. 661, 248 So.2d 157 (1971)
California:	*People v. Massengale*, 10 Cal. App.3d 689, 89 Cal. Rptr. 237 (1970)
Florida:	*Stonom v. Wainwright*, 235 So.2d 545 (Fla. 1970)
Illinois:	*People v. Baze*, 43 Ill.2d 298, 253 N.E.2d 392 (1969).

of fourteen (14) have held *Pearce* applies to trials *de novo* and have explicitly or implicitly held it retroactive.[4] Ten

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Iowa:	*State v. Pilcher*, 171 N.W.2d 251 (Iowa 1969)
Kentucky:	*Hord v. Commonwealth*, 450 S.W.2d 530 (Ky. 1970)
Michigan:	*People v. Payne*, 386 Mich. 84, 191 N.W.2d 375 (1971)
Missouri:	*State v. Rentschler*, 444 S.W.2d 453 (Mo. 1969)
New York:	*People v. Rodriguez*, 34 App. Div.2d 911, 311 NYS.2d 330 (1970)
Pennsylvania:	*Commonwealth v. Allen*, 443 PA 96, 277 A.2d 803 (1971)
Rhode Island:	*Cournoyer v. Sharkey*, 107 RI 373, 267 A.2d 722 (1970)
Texas:	*Miller v. State*, 471 S.W.2d 399 (Tex. Cr. 1971)
Wisconsin:	*Denny v. State*, 46 Wis.2d 541, 178 N.W.2d 625 (1970)

PEARCE EXPLICITLY HELD NOT RETROACTIVE

Maryland:	*Wayne v. State*, 8 Md. App. 5, 257 A.2d 455 (1969)
Kansas:	*Young v. State*, 207 Kan. 166, 483 P.2d 1020 (1971)

[4] *PEARCE* APPLIED RETROACTIVITY TO TRIAL DE NOVO

Arizona:	*Bronstein v. Superior Court*, 106 Ariz. 251, 475 P.2d 235 (1970)
Hawaii:	*State v. Shak*, 51 Hawaii 626, 466 P.2d 420 (1970)
Indiana:	*Eldridge v. State*, ____ Ind. ____, 267 N.E.2d 48 (1971)
Pennsylvania:	*Commonwealth v. Harper*, 219 Pa. Super. 100, 280 A.2d 637 (1971)

(10) out of the thirty-seven (37) have held it was not applicable to the fact situation before the Court.[5]

b. Statute

Both New York and California utilize a form of statutory sentencinng.[6] However, in those cases where a judge retained some discretion in resentencing, appellate

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New Jersey: *State v. DeBonis*, 58 N.J. 182, 276 A.2d 137 (1971)

Maryland: *Cherry v. State*, 9 Md. App. 416, 264 A.2d 887 (1970)

[5]*PEARCE* HELD NOT APPLICABLE TO JUDGE RESENTENCING

Alaska: *Whitton v. State*, 479 P.2d 302 (Alas. 1970)

Delaware: *Harris v. State* ____ Del. ____ 293 A.2d 562 (1972)

Georgia: *Chaffin v. State*, 227 Ga. 327, 180 S.E.2d 741 (1971)

Massachusetts: *Walsh v. Commonwealth*, ____ Mass. ____, 260 N.E.2d 911 (1970).

Minnesota: *Beltowski v. State*, 289 Minn. 215, 183 N.W.2d 563 (1971)

Mississippi: *Wood v. State*, ____ Miss. ____ 257 So.2d 193 (1972)

Nebraska: *State v. Stanosheck*, 186 Nebr. 17, 180 N.W.2d 226 (1970)

New Hampshire: *State v. Flynn*, 110 N.H. 451, 272 A.2d 591 (1970)

Ohio: *State v. Meeker*, 26 Ohio St.2d 9, 268 N.E.2d 589 (1971)

Tennessee: *Patten v. State*, 2 Tenn. Cr. App. 179, 452 S.W.2d 664 (1970)

[6]New York: Classification of Felonies, NY Penal Law § 55.05; utilization of juries in some murder convictions, NY Penal Law §125.30 §125.35; Judge sets minimum in Class A felony; NY Penal Law §70.00 (3)(a).

courts from those states have applied *Pearce* retroactively or have cited *Pearce* with approval while citing previous cases from that state as controlling.[7]

c. Jury Sentencing

In jury sentencing situations, Florida and Oklahoma have applied *Pearce* retroactively. Texas and Tennessee applied *Pearce* retroactively but would not apply it to a jury imposed sentence. Kentucky and Missouri discuss *Pearce*. It is unclear if they would hold it retroactive to judicial sentencing, however, those states held it did not apply to a jury sentencing.[8]

California: Jury sets penalty where choice is death or life imprisonment, Cal. Penal Code §190.1 (West Cum. Supp. 1968); statutory scheme of minimum and maximum; Cal. Penal Code §1168.

[7]*PEARCE* HELD RETROACTIVE AND CONTROLLING IN STATES NOW UTILIZING A FORM OF STATUTORY SENTENCING.

California: *Miller v. Hamm*, 9 Cal. App.3d 860, 88 Cal. Rptr. 538 (1970) relying upon a pre-*Pearce* California case, *People v. Henderson*, 60 Cal.2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963).

New York: *People v. Winslow*, 34 App. Div.2d 1050, 312 NYS 495 (1970).

[8]*PEARCE* HELD IMPLICITLY RETROACTIVE AND APPLIED TO A JURY SENTENCING.

Florida: Roberson v. State, 258 So.2d 257 (Fla. 1971) Implicitly overruling *State v. Miller*, ____ Fla. ____, 231 So.2d 260 (1970).

Oklahoma: *Torbett v. State*, 487 P.2d 357 (Okla. 1971).

d. Conclusion

It should therefore be clear from a review of the states that those states considering *Pearce* have almost unanimously accepted without discussion the fact that it is retroactive. In all but two states, those which declined to apply *Pearce* did so because they found *Pearce* did not control a particular fact situation.

The conclusion is therefore inescapable that the states have considered the effect of the retroactive application of *Pearce* to have a minimal impact on the administration of justice compared to the gravity of the harm inflicted on the assertion of a constitutional or statutory right to appeal a criminal conviction.[9] As the Pennsylvania Supreme Court said in *Commonwealth v. Allen*, 443 Pa. 96, 277 A.2d 803, 806 (1971):

PEARCE HELD IMPLICITLY RETROACTIVE AND NOT APPLIED TO A JURY SENTENCING.

Tennessee:	*State* ex. rel. *Pinkard v. Henderson*, 2 Tenn. Cr. App. 240, 452 S.W.2d 908 (1969)
Texas:	*Branch v. State*, 445 S.W.2d 756 (Tex. Cr. 1969) and *Gibson v. State*, 448 S.W.2d 481 (Tex. Cr. 1969) and *Casias v. State*, 452 S.W.2d 483 (Tex. Cr. 1970).

UNCLEAR IF *PEARCE* HELD RETROACTIVE AND HELD NOT TO APPLY TO A JURY SENTENCING

Kentucky:	*Brooks v. Commonwealth*, 447 S.W.2d 614 (Ky. 1969)
Missouri:	*Spidle v. State*, 446 S.W.2d 793 (Mo. 1969)

[9]The situation in which an increased sentence may result from *re-conviction following an appeal* should be distinguished from imposition of a different sentence *upon appeal of the length of the original sentence.*

Compare: Massachusetts, *Walsh v. Commonwealth*, ___ Mass. ___, 260 N.E.2d 911 (1970). Held *Pearce* not applicable to an appellate review of sentencing where sentence can be increased on appeal. Five (5) other states by statute allow such an

"Contrasting the avowed purpose of the ruling to prevent 'penalizing those who choose to exercise' constitutional rights,' 395 U.S. at 724, 89 S.Ct. at 2080, with the negligible reliance by law enforcement officials on the old standards and the de minimus effect on the administration of justice, we hold that Pearce is to be applied retroactively. Accord, *Pinkard v. Neil*, 311 F. Supp. 711 (M.D. Tenn. 1970)."

The Petitioner-Appellant erroneously asserts that *Allen* stands for a prospective only holding for *Pearce*. *Allen* held prospective that procedural portion of *Pearce* which held that a judge must state his reasons for imposing a higher sentence at the time of sentencing. (227 A.2d at 805). *Allen* went on to hold that in *pre Pearce* cases the higher sentence would be overturned and the first sentence would "be reinstated unless the second sentencing judge files a supplemental opinion adequately and properly listing his reasons for the increased sentence . . ." 277 A.2d at 806. Thus *Allen* specifically adopted the record supplementation procedure employed in *Odom v. United States*, 400 U.S. 23, 91 S.Ct. 112; 27 L.Ed. 2d 122 (1970), in *Moon v. Maryland*, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed. 2d 262, and in *Michigan v. Payne*, 386 Mich. 84 (1970) and then specifically held that *Pearce* applied. The Court in *Allen* applied this procedure because it "recognized the difficult burden of proof of a criminal defendant encounters by attacking his increased sentence." 277 A.2d at 806.

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increase: Alaska Stat. §12.55.120 (Supp. 1969); Conn. Gen. Stat. Rev. §§51-194, 51-195, 51-196 (Supp. 1970) Me. Rev. Stat. Ann. tit. 15, §§2141-2144 (Supp. 1970); Mo. Ann. Code art. 26, §§132-138 (1966); Mass. Gen. Laws Ann. ch. 278, §§28A-D (Supp. 1969); Mont. Rev. Codes Ann. §§95-2211, 95-2501 to 95-2504 (1969).

2. *No Federal Circuit Court of Appeals Has Held* Pearce *Prospective Only.*

Ten (10) out of the eleven (11) Federal Courts and Circuit Courts of Appeal have applied *Pearce* or pre *Pearce* cases retroactively to the increase of sentence following a reconviction.[10]

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[10]FEDERAL CIRCUIT COURTS OF APPEAL DECLINING TO DECIDE RETROACTIVITY QUESTION BUT APPLYING IT TO THE CASE BECAUSE PENDING ON APPEAL WHEN *PEARCE* RELEASED.

DC Cir: *Barnes v. United States*, 419 F.2d 753 (DC Cir. 1969)

FEDERAL CIRCUIT COURTS OF APPEAL HOLDING *PEARCE* RETROACTIVE WITHOUT DISCUSSION ON SENTENCE INCREASE AFTER RECONVICTION

2nd Cir: *United States v. Barash*, 434 F.2d 358 (2nd Cir. 1970) *United States* ex. rel. *Williams v. McMann*, 436 F.2d 103 (2nd Cir. 1970).

4th Cir: *Wood v. Ross and Rice v. North Carolina*, 434 F.2d 297 (4th Cir. 1970).
Levine v. Peyton, 444 F.2d 525 (4th Cir. 1971) (*Pearce* applies to jury sentencing)
United States v. Gambert, 433 F.2d 321 (CA4 1970) (post *Pearce*, *Pearce* applied and sentence reversed)

6th Cir: *United States v. King*, 415 F.2d 737 (6th Cir. 1969)
Pendergrass v. Neil, 456 F.2d 69 (CA6, 1969) (applied *Pearce* to jury sentencing relying on *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L. Ed.2d 138 (1968)

8th Cir: *United States v. Gross*, 416 F.2d 1205 (CA 8, 1969)

9th Cir: *United States v. Sanders*, 435 F.2d 165 (CA 9, 1970)

No Circuit Court of Appeals has held that *Pearce* is not retroactive. The 10th Circuit declined to decide the retroactivity issue in *Tipton v. Baker*, 432 F.2d 245 (C.A. 10, 1970) but applied *Pearce* in any event by remanding for a determination of whether due process had been violated. The District of Columbia Circuit Court of Appeals likewise declined to decide the retroactivity question but went on to apply *Pearce* to the case before it because it, like *Payne*, was pending at the time *Pearce* was released. The Second, Sixth, Eighth and Ninth Circuit Courts of Appeal have applied *Pearce* in cases where the second sentence occurred prior to *Pearce* without a discussion of retroactivity, thus implicitly holding it retroactive. In the First and Third Circuit

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FEDERAL CIRCUIT COURTS OF APPEAL SPECIFICALLY HOLDING *PEARCE* RETROACTIVE ON INCREASES OF SENTENCE AFTER RECONVICTION.

4th Cir:	*James v. Copinger*, 441 F.2d 23 (CA4, 1971) dicta
5th Cir:	*Henderson v. United States*, 446 F.2d 557 (CA5, 1971)

CIRCUITS RELYING ON PRE *PEARCE* DECISIONS WHICH DISALLOWED HIGHER SENTENCES WHICH PUNISHED THE EXERCISE OF THE RIGHT TO APPEAL

1st Cir:	*Marano v. United States*, 374 F.2d 583 (CA1, 1967) *United States v. Daniels*, 446 F.2d 967 (CA1, 1971) through post-*Pearce* follows *Marano*
3rd Cir:	*United States* ex. rel. *Starner v. Russell*, 378 F.2d 803 (CA3, 1967) citing *Marano*, supra as to standards applicable
4th Cir:	*Patton v. North Carolina*, 381 F.2d 636 (CA4 1967)
7th Cir:	*United States v. White*, 382 F.2d 445 (CA7 1967)

Courts of Appeal, *Marano v. United States*, 374 F.2d 583 (C.A. 4, 1967), and *United States v. Russell*, 378 F.2d 808 (C.A. 3, 1967), were the precursors of *Pearce*. Cases such as *United States v. Daniels*, 446 F.2d 967 (C.A. 1, 1971), have simply cited *Marano* and not relied on *Pearce*. This is also true for two other pre-*Pearce* cases from the Seventh and Fourth Circuits *United States v. White*, 382 F.2d 445 (C.A. 7, 1967), and *Patton v. North Carolina*, 381 F.2d 636 (C.A. 4, 1967), though the Seventh Circuit subsequently adopted *Pearce* without discussion of retroactivity in *Berry v. United States*, 435 F.2d 224 (C.A. 7, 1970). Finally, the Fourth and Fifth Circuit Courts of Appeal adopted *Pearce* as retroactive after a full discussion, *James v. Copinger*, 441 F.2d 23 (C.A. 4, 1971), and *Henderson v. United States*, 446 F.2d 557 (C.A. 5, 1971). The Fifth Circuit in *Henderson* relied on a prior case from that Circuit, *United States v. Wood*, 413 F.2d 437 (C.A. 5, 1969), which had adopted *Pearce* without discussion.

It is therefore clear that the Federal Circuit Courts of Appeal have held implicitly or explicitly that *Pearce*, or the *Pearce* rationale, should be applied retroactively.

The Petitioner-Appellant misleads this Court by citing *United States v. Gambert*, 433 F.2d 321 (C.A. 4, 1970), for the proposition that *Pearce* is to be applied prospectively only. *Gambert* is a post-*Pearce* case, 433 F.2d at 322 n. 5 and text, the increased sentence having been imposed three months after *Pearce*. The Court there held that the supplemental affidavit of the second judge was not sufficient and *reversed* the higher sentence for failure to show conduct supportive of the higher sentence.

Petitioner-Appellant further cited *Allen v. Henderson*, 434 F.2d 26 (C.A. 5, 1970), implying that the Fifth Circuit has refused to treat the resentencing portion of *Pearce* retroactively. However, in a subsequent case, *Henderson v. United States*, 446 F.2d 557 (C.A. 5, 1971), the court explicitly held *Pearce* retroactive to an increased sentence and cited other Fifth Circuit cases in accord.

It is clear that the Federal Circuit Courts of Appeal feel that the retroactive application of *Pearce* would have a *de minimus* impact on the administration of justice compared to the abhorrent policy of placing a price on the exercise of a right to appeal. Being faced with the risk of a higher sentence after a successful appeal, for whatever reason it might be imposed, would have deterred many of those situated as Payne from appealing. The effect of such a policy would be to shield from appellate supervision gross abuses of a defendant's rights as occurred in Payne's case, *infra*. The implicit or explicit threat of a higher sentence should not now and never should have been the price set for access to our appellate system.

It should be emphasized as well that a reversal coupled with resentencing does not present the massive administrative burden that a re-trial might present.* All the information needed to resentence should be contained in the records of the defendant held by the courts or the relevant departments of corrections.

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*At the time this brief was in galley-proof stage, this Court released *Robinson v. Neil*, U.S. ___ , ___ L.Ed. 2d ___ , S.Ct. ___ , 12 Cr. L. 3071, (January 16, 1973). This Court there stated that retroactivity of a constitutional holding requiring resentencing was "without the necessity of a redetermination of the factual question of whether the offense had in fact been committed. Thus the prejudice to the State resulting from the necessity of an entire new trial . . . with the attendant difficulties of again rounding up witnesses . . . was not present." 12 Cr. L. at 3072.

3. *All of the Federal District Courts Considering the Issue Have Held Pearce Retroactive*

Of the twelve district courts considering the question, all have accepted the fact that *Pearce* ought to apply whenever the abuse of the sentencing power presents itself.[11] The District Court for the Middle and Eastern District of Tennessee have explicitly held *Pearce* retroactive. *Pinkard v. Neil*, 311 F.Supp. 711 (D.C. Md. Tenn. 1970), and *Britt v. Tollett*, 329 F. Supp. 568 (D.C. Ed. Tenn. 1971).

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[11] *PEARCE* HAS BEEN HELD RETROACTIVE BY ALL THE UNITED STATES DISTRICT COURTS WHICH HAVE CONSIDERED THE ISSUE.

ED Tenn	*Britt v. Tollett*, 329 F. Supp. 568 (DC ED Tenn. 1971)
ND Texas	*Casias v. Beto*, 333 F. Supp. 214 (DC ND Texas 1971)
WD NC	*Culp v. Bounds*, 325 F. Supp. 416 (DC WD NC 1971)
WD Va	*Griffin v. Wilkerson*, 335 F. Supp. 1272 (DC WD Va. 1971)
ED Va	*Love v. Winston*, 322 F. Supp. 567 (DC ED Va. 1971) Applicable to trial *de novo*
ED NC	*McDougald v. Ivester*, 321 F. Supp. 943 (DC ED NC 1971) Applicable to trial *de novo*
MD Tenn	*Pendergrass v. Neil*, 338 F. Supp. 1198 (DC MD Tenn. 1971) Applicable to Jury resentence
MD Tenn	*Pinkard v. Neil*, 311 F. Supp. 711 (DC MD Tenn 1970) Explicitly held retroactive.
SD Iowa	*Sefcheck v. Brewer*, 301 F. Supp. 793 (DC SD Iowa 1969)
ED NC	*Torrance v. Henry*, 304 F. Supp. 725 (DC ED NC 1969)

B. *Pearce* Should Be Given Retroactive Application To Protect Those Who Have Already Appealed From Vindictive Abuse of the Sentencing Process by Requiring That the Reasons for an Increased Sentence Be Made Available for Appellate Review.

Since the purpose of sentencing is to determine the appropriate length of sentence to be imposed on a defendant, improper use of the sentencing process to punish those who have appealed or to deter those from appealing who have not appealed affects the very integrity of the sentencing, fact-finding process. The proper use of sentencing is to consider the defendant's "life, health, habits, conduct, and mental and moral propensities." *Williams v. New York*, 337 U.S. 241; 245; 93 L.Ed. 1337, 1341, 69 S.Ct. 1079 (1949). It is an abuse of the sentencing process to consider whether the defendant has appealed. *Pearce* recognized that " 'A new sentence, with enhanced punishment, based upon . . . vindictiveness would be a flagrant violation of the rights of the defendant.' (citation omitted.)" 395 U.S. at 724. Therefore, *Pearce* was dealing with more than the case where vindictiveness was the stated reason for the increased sentence. *Pearce* was concerned with whether, at any time, the "State offered any reason or justification for that sentence beyond the naked power to impose it." 395 U.S. at 726. *Commonwealth v. Allen, supra*, 277 A.2d at 806. Specifically, *Pearce* required a fact finding of "objective information concerning identifiable con-

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D Mass	*Walsh v. Picard*, 328 F. Supp. 427 (D Mass 1971)
ND Ga	*Zaffarano v. Blackwell*, 307 F. Supp. 1109 (DC ND GA 1969)

duct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." 395 U.S. at 726. Cf., *Moon v. Maryland*, and *Odom v. United States, supra.*

This Court has previously held retroactive constitutional violations affecting the integrity of the fact-finding process at sentencing. In holding *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1967), retroactive this Court said in *McConnell v. Rhay*, 393 U.S. 2, 21 L.Ed. 2d 2, 89 S.Ct. 32, that the need for counsel at sentencing was apparent and should be retroactive because the right being asserted affected " 'the very integrity of the fact-finding process.' *Linkletter v. Walker*, 381 U.S. 618, 639, 14 L.Ed. 2d 601, 614, 85 S.Ct. 1731 (1965)." Likewise, in this case the use or abuse of the sentence process by a judicial officer affects the fundamental integrity of the sentencing process and the essence of fairness of the judicial system. It is clear from a reading of *Pearce* that this Court was concerned explicitly with protecting the rights of the defendant and implicitly but necessarily with the integrity of the judicial system. Cf. *United States v. United States Coin and Currency*, 401 U.S. 715; 28 L.Ed. 2d 434; 91 S.Ct. 1041 (1971).

Also to be considered in this context is the fact that at sentencing a man's liberty is directly at stake. This is what preserving the "integrity of the fact finding process" at a trial or plea is designed to protect. If retroactivity would attach where the integrity of the process of a trial or plea is at stake, *Pickelsimer v.*

Wainwright, 375 U.S. 2; 11 L.Ed. 2d 41; 84 S.Ct. 80 (1963), no less should it attach when the integrity of the process of punishment imposition is at stake.

C. As Noted in *North Carolina v. Pearce*, There Could Be No Detrimental Reliance Prior to *Pearce* on the Allowance of a Higher Sentence After a Reconviction.

To begin with, the Judge Byrns at the second sentencing gratuitously stated for the record that he was not punishing Payne for appealing: "I am not setting a larger sentence than what I will set in a few minutes because you appealed or because of any added work or expense of a new trial." He then went on the allege why he was increasing the sentence. (P.C. 65) This claim at sentencing, along with Judge Byrns' subsequent affidavits, provide ample opportunity for this Court and the lower Courts to apply the *Pearce* standards with no detrimental impact on the administration of justice in this case. This case, therefore, has proceeded much like any post-*Pearce* case might with the judge having the additional opportunity of submitting one solicited affidavit and one unsolicited affidavit. The Michigan Supreme Court found as a matter of fact and law that Judge Byrns' reasons for the increased sentence were insufficient justification and that the sentence itself was "constitutionally impermissible." *People v. Payne*, 384 Mich. 84, 97 (1971).

Further, this Court noted in *North Carolina v. Pearce*, 395 U.S. 711, 716; 23 L.Ed. 2d 656, 663-664; 89 S.Ct. 2072 (1969) in footnote 5:

> "5. The United States Courts of Appeals have reached conflicting results in dealing with the basic

problem here presented. In addition to the Fourth and Fifth Circuit decisions here under review, see *Marano v. United States*, 374 F.2d 583 (C.A. 1st Cir.); *United States v. Coke*, 404 F.2d 836 (C.A. 2d Cir.); *Starner v. Russell*, 378 F.2d 808 (C.A. 3d Cir.); *United States v. White*, 382 F.2d 445 (C.A. 7th Cir.); *Walsh v. United States*, 374 F.2d 421 (C.A. 9th Cir.); *Newman v. Rodriguez*, 375 F.2d 712 (C.A. 10th Cir.). The state courts have also been far from unanimous. Although most of the states seem either not to have considered the problem, or to have imposed only the generally applicable statutory limits upon sentences after retrial, a few States have prohibited more severe sentences upon retrial than were imposed at the original trial. See *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677; *People v. Ali*, 66 Cal. 2d 277, 424 P.2d 932; *State v. Turner*, 247 Ore. 301, 429 P.2d 565; *State v. Wolf*, 46 N.J. 301, 216 A.2d 586; *State v. Leonard*, 39 Wis. 2d 461, 159 N.W.2d 577."

To this list could also be added *People v. Mulier*, 12 Mich. App. 28 (1968), upon which Payne's appeal to the Michigan Court of Appeals was based.

As this Court said in *People v. Donnelly*, 397 U.S. 286, 294, 25 L.Ed. 2d 312, 319, 90 S.Ct. 1033 (1970): "Deviant rulings by circuit Court of Appeals, particularly in apparent dictum, cannot generally provide the 'justified reliance' necessary to warrant withholding retroactive application of a decision . . ." See also *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 20 L.Ed. 2d 1231, 88 S.Ct. 2224 (1968).

D. Because Appellee Payne Had Preserved the *Pearce* Issue on Appeal Before *North Carolina v. Pearce* Was Decided, He Should Be Afforded the Protection of Retroactive Application.

At the time *North Carolina v. Pearce* was released, *People v. Payne*, 18 Mich. App. 42 (1969), was pending in the Michigan Court of Appeals. Payne's appeal was based upon *People v. Mulier, infra*, a 1968 decision of Michigan Court of Appeals. In the majority *Payne* opinion from the Michigan Court of Appeals, application of *Mulier* was denied on the basis that the second sentencing judge had obseeved Payne at a trial and not at a plea as had the first judge. At that time the Michigan appellate court was unaware that the first judge had seen Payne and heard as many, if not more facts about the shootings than had the second judge since the first judge presided over the trial of Payne's alleged accomplice, Lionel Bradford. (See *infra.*) It is now unclear how the Court of Appeals would have ruled had they known this crucial fact. Further, while the Michigan Court of Appeals' dissent discussed *Pearce*, the majority did not. In any event with the limited knowledge that they had, the Michigan Supreme Court held as a matter of fact and law that the *Pearce* standards had not been met. *People v. Payne*, 384 Mich. 84 (1971).

To now deny Payne the protection of *Pearce* or *Mulier* would be contrary to any concept of due process. *Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed. 2d 601, 85 S.Ct. 1731 (1965); *Carafas v. Lavallee*, 391 U.S. 234, 20 L.Ed. 2d 554, 88 S.Ct. 1556 (1968); *Tehan v. Shott*, 382 U.S. 406, 15 L.Ed. 2d 453, 86 S.Ct. 459 (1966); *Angelet v. Fay*, 381 U.S. 654, 14 L.Ed. 2d 623, 85 S.Ct. 1750 (1965).

While we in no way retreat from the position that *Pearce* should be applied with full retroactivity, it would be a travesty of justice to deny relief to those defendants who had raised the complaint raised here prior to *Pearce*. This is particularly true where the impact on the administration of justice would be slight, where the right asserted goes to the essence of the use or abuse of the sentencing process, and where the judge has had adequate opportunity to express his reasons to the courts for the increased sentence.

II.

ASSUMING *PEARCE* APPLIES RETROACTIVELY, PAYNE'S INCREASED SENTENCE CANNOT LEGALLY OR FACTUALLY BE SUSTAINED.

A. There Is No Conduct After Payne's First Sentencing Which Can Justify the Higher Sentence.

This Court in *Pearce* described the situation in which an increased sentence may occur and the procedure to be used in the following brief passage:

> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (395 U.S. at 726).

From this it can be seen that *Pearce* is concerned with more than explicit judicial vindictiveness. Any increase in sentence would violate due process if its sole purpose was to punish a defendant for exercising a constitutional or statutory right to appeal. Therefore, *Pearce* extends beyond the bounds of announced judicial vindictiveness. This is so because knowledge of the possibility of an increased sentence would naturally have a direct effect on a defendant's decision as to whether he should appeal.

> "A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." (395 U.S. at 726).

Pearce does, of course, permit a sentence increase when it is based on a defendant's conduct subsequent to the original sentencing. Such objective conduct would be a factor in determining whether a defendant's sentence increase was a product of judicial vindictiveness. More important, however, is that if the defendant must be personally responsible for acts before his sentence can be increased, then he has it within his own power to prevent an increase. Any dilemma–if the dilemma is warranted even under this circumstance–would be of his own choosing.

The rationale behind such a ruling is apparent. A defendant considering whether to appeal a conviction has no idea what might motivate a judge or jury at resentencing, should he be reconvicted. If increases are permitted without denoting what reasons can support the second sentence, any appeal would be at the risk that his sentence might be increased for reasons over which he has no control–thus perpetuating the very dilemma *Pearce* sought to correct.

An excellent case dealing with the decisional dilemma the exercise of a constitutional right can create is *United States v. Jackson*, 390 U.S. 570, 20 L.Ed.2d 138, 88 S.Ct. 1209 (1968). *Jackson* involved the death penalty and the effect of its threat on the defendant's assertion of his right to a jury trial. The language of that opinion indicates that this Court was not as concerned with the certainty that the prospects of a more severe punishment would deter the exercise of a defendant's right to a jury as with the *tendency* that such a threat would have that effect. This is equally true in the *Payne* situation. It is the possibility of an increased sentence without the power to prevent it that necessarily has deterred and will deter appeals if the conduct to be considered in aggravation of the original sentence can have occurred at any time and is not subject to limiting guidelines.

The judge at Payne's re-sentencing listed three primary factors he considered in increasing Payne's sentence. First, he considered the fact that he sat through an entire trial and heard far more about Payne and about the crime than did the first sentencing judge, Judge Hadsell. Second, he felt that Payne had perjured himself at the second trial. And third, he felt that Payne failed to show any remorse. We will show that Judge Byrns was factually incorrect in his assertions and, further, that they are not the kind of conduct contemplated as permissible by *Pearce* in order to sustain a higher sentence.

1. *It Is Legally Insufficient and Factually Incorrect To Claim That Seeing Appellee at a Retrial Was Conduct Sufficient upon which To Base His Higher Sentence.*

This Court recognized implicitly in its disposition of *Simpson v. Rice,* companion case to *Pearce, supra,* that the mere fact that a judge has had a greater opportunity to observe a defendant at trial is an insufficient basis, without more, upon which to justify an increased sentence. This was noted by the majority opinion in the Michigan Supreme Court below, 386 Mich. at 91-92 n. 5:

> "Nor is the present case distinguishable from *Pearce, supra,* because Mr. Payne's original conviction was by guilty plea, that is, because only the second sentencing judge had the opportunity to gain impressions of Mr. Payne and his crime throughout a trial. In *Pearce's* companion case, *Simpson v. Rice,* Mr. Simpson's original convictions were by guilty plea; he was subsequently reconvicted by a jury, whereupon he received a stiffer sentence. Whatever our own views are, we cannot ignore the fact that the United States Supreme Court did not find this difference between *Simpson* (one trial) and *Pearce* (two trials) worthy of distinguishing note. The holding of the Court as regards harsher sentence upon reconviction applied fully to both cases."

It is questionable, moreover, under the factual situation presented in this case, whether the second sentencing judge can be said to have had any advantage over the first sentencing judge with respect to observation of Payne at trial. As mentioned in Appellee's Statement of the Case, Payne testified at the trial of Lionel Bradford, an alleged accomplice in the shootings of Officers Yost and Plummer, between the time he pleaded guilty to and was sentenced for his assault upon Yost. (Appellee's Appendix B). The testimony at that trial concerning the gravity

of Payne's conduct was equivalent in scope and content to the similar testimony elicited at Payne's trial over four years later. This can be seen by comparing the testimony of Officer Yost at both trials (2b *et seq.*] and Appendix of Appellant in Michigan Supreme Court, 1a-38a); by comparing the testimony of Dr. Luther Zick, who treated Plummer and testified at the first trial 6b *et seq.*) with the testimony of Dr. Robert Reagan, who treated Yost and testified at the second trial (Appendix of Appellant in Michigan Supreme Court, 78a-88a) and by noting that Officer Plummer, whom Payne was alleged to have shot in addition to Officer Yost, testified only at the first trial before Judge Hadsell (41b *et seq.*). At the Bradford trial Payne admitted participation in the shootings (10b *et seq.*) while he denied being involved four years later at his own trial. (Appendix of Appellant in Michigan Supreme Court, 159a). Thus while Payne had not himself been brought to trial and subjected to scrutiny as a defendant in jeopardy by the first sentencing judge, it would be foolish to content that the second sentencing judge had any significantly different data on which to judge the gravity of Payne's offense. Judge Byrns apparently has recognized this point through submission of his unsolicited second affidavit (Appellant's Brief on Appeal, p. 43) though, in paragraph 3 thereof, his characterization off Judge Hadsell's opportunity to see and hear Payne at the Bradford trial as "limited" hardly squares with either the comparative testimony in the two trials outlined above, or with Judge Hadsell's understanding upon sentencing Payne that he had "all the facts . . . in mind." (P.C. 59).

2. *It Is Legally Insufficient and Factually Incorrect To Base an Increased Sentence Upon a Claim that Payne Perjured Himself at His Second Trial.*

Though Judge Byrns implicitly indicated at the second sentencing that he disbelieved Payne's 1967 trial testimony by stating that he "agreed with the jury's verdict of guilty," (263a), it was not until May 10, 1971, when Judge Byrns submitted an affidavit upon request of the Michigan Supreme Court, that he explicitly charged Payne with perjury at the 1967 trial and adopted that claim as relevant to Payne's increased sentence. (P.C. 68-69).

It cannot be denied that Payne testified differently at his 1967 trial than he did at the March, 1963, trial of Lionel Bradford and at his December, 1962, guilty plea hearing. There is overwhelming justification for Payne's change of testimony, however, in view of the facts behind his arrest, guilty plea, and subsequent testimony at the Bradford trial prior to his own sentencing.

Leroy Payne was arrested at his home in the early morning hours of November 5, 1962, and later charged with assault with intent to murder[12] Officer Yost. Approximately 24 hours later Payne confessed to his involvement in the shooting of Yost and Plummer, and implicated Lionel Bradford. During the day and night that elapsed between his arrest and confession, Payne was beaten, derided with racial epithets by police officers, and repeatedly subjected to torture by sheriff's officers including the squeezing of his genitals and twisting of his

[12]MCLA 750.83; MSA 28.278. This offense carries with it a maximum sentence of life or any number of years.

fingers. His family was threatened and he was deprived of food, water and sleep until he confessed. (27b-31b). Though he was taken in a beaten condition before a judge during that 24 hours for purposes of arraignment, the judge did nothing about his condition and returned Payne to his captors (30b).[13] The following 3 days were marked by additional torture of Payne at the hands of Michigan State police personnel as well as Benton Harbor, Michigan, police officers (31b-35b). Payne's arm was twisted and his genitals squeezed until his previously extracted confession was reaffirmed for purposes of a tape recording. Payne remained in the custody of the Berrien County Sheriff's Department until December 14, 1962, when he pleaded guilty, and remained in that custody up to his sentencing following the Bradford trial.

Both Payne's plea of guilty and his testimony at the Bradford trial have been ruled coerced and hence, unreliable. Following remand from the Michigan Court of Appeals (Appendix of Appellant in Michigan Supreme Court, 251a.), Judge Byrns himself in June, 1967, found Payne's confession and plea involuntary and ordered the plea vacated and a trial held (Ibid., 253a-254a). As to Payne's testimony at Bradford's 1962 trial; the Honorable Cornelia Kennedy of the United States District Court for the Eastern District of Michigan, in *Bradford v. Johnson*, Civil Action No. 37176, granted Lionel Bradford's petition for a writ of habeas corpus in an opinion and order dated July 14, 1972, and gave therein her reasons:

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[13]Ironically, Payne's beaten condition was such that a photograph of him taken around the time he was arraigned on the arrest warrant and sought to be introduced to impeach his testimony at Bradford's trial was not admitted on grounds that it was too inflammatory. (45b-48b).

"No court would knowingly allow the police or prosecutor to call a person to testify who had no knowledge of the case and encourage him to conjure testimony simply because the State needed a witness. In effect, that is what happened here. Through the use of medieval torture techniques Payne was asked to be the star witness with a reward of cessation of pain and fear upon giving the proper testimony. The real threat of further abuse was not removed. Under these circumstances, the use of knowingly coerced incrimination of another is so patently untrustworthy that it rivals the knowing use of perjured testimony. The petitioner ought, at least, under a system of rebuttable presumption of innocence, be given the safeguard of uncoerced, untortured incrimination by another.

"For the reasons stated herein the motion to dismiss the petition for writ of habeas corpus is DENIED and the petition for writ of habeas corpus is GRANTED.

"IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence imposed upon petitioner LIONEL BRADFORD by the Circuit Court for Berrien County, Michigan, on February 6, 1963, be vacated."

Bradford v. Johnson, supra, is currently pending in the United States Court of Appeals for the Sixth Circuit, Docket #72-1905.[14]

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[14] Judge Kennedy's opinion of Bradford's trial was shared by three justices of this Court. See dissenting opinion of Mr. Chief Justice Warren, joined by Justices Douglas and Marshall, to denial of petition for certiorari in *Bradford v. Michigan*, 394 U.S. 1022, 23 L Ed.2d 48, 89 S.Ct. 1638 (1969).

While Judge Byrns may *subjectively feel* that Payne did not tell the truth at his 1967 trial, the record is clear, both legally and factually, that any deviation between Payne's 1967 testimony and his earlier testimony is explainable in terms of violations of Payne's constitutional rights. Hence an increased sentence based upon that deviation would create a situation in which Payne "suffers anew from the deprivation" of his constitutional rights. *Burgett v. Texas*, 389 U.S. 109, 115, 19 L.Ed.2d 319, 325, 88 S.Ct. 258 (1967).

While Judge Byrns claims Payne to be a perjurer, no formal charges of perjury have been filed against Payne. Indeed, Judge Byrns' charge against Payne could be made against any defendant whose conviction by guilty plea is vacated and who claims innocence at a new trial. Such is hardly "*objective* information concerning identifiable conduct," *Pearce, supra*, 395 U.S. at 726, unless the second sentencing judge is allowed to occupy the positions of prosecutor, judge, and sentencer—a concept prohibited as a flagrant denial of due process in *In re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955). C.f. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

3. *It Is Legally Insufficient and Factually Incorrect To Base an Increased Sentence on the Fact That Payne's Remorseful Attitude Had Changed.*

In his affidavit to the Michigan Supreme Court, Judge Byrns claimed as a reason for Payne's increased sentence that he showed no remorse for his part in the shootings (P.C. 68, 69). The transcript of the second sentencing shows, however, that Payne's attorney did speak on his behalf prior to imposition of the second sentence: "The

Court: Mr. Brown, you have spent some time with me arguing very eloquently and ably on behalf of your client towards mitigation of sentence." (P.C. 62). Payne's failu_ to add to what his attorney had told the judge can hardly qualify as "identifiable conduct" warranting an increased sentence.

Even had there been no exercise of allocution by Payne or his attorney, under Michigan law the judge would have had no right to increase Payne's sentence because he continued to maintain his innocence following conviction. In the recent case of *People v. Arthur Lee Bottany*, ___ Mich. App. ___ (Docket #12201, released to parties October 55, 1972), Judge, now Michigan Supreme Court Justice Charles L. Levin made it clear that convicted defendants must not be made to trade their right to trial or appeal in exchange for a reduced sentence. Arthur Lee Bottany, the defendant, and his brother, John Bottany, were charged with breaking into and robbing a tavern. John chose to plead guilty while Arthur Bottany chose to exercise his right to trial and was convicted.

> "At the time the judge accepted John Bottany's plea of guilty, he told Arthur Bottany, the Defendant:
>
> 'The Court: * * * Now, I understand you want a jury trial on ten year maximum and a four year maximum?
>
> A. Yes, sir.'
>
> 'The Court: The philosophy of this Court that I follow–'
>
> 'Let me get that decision.'
>
> 'The Supreme Court has just handed down a decision in *Brady* versus *United States* [397 U.S. 753; 90 S.Ct. 1463; 25 L.Ed.2d 747 (1970)] in regard to guilty pleas.'

'The United States Supreme Court indicated—and I will quote exactly from that opinion, and I follow the philosophy of the United States Supreme Court—"Of course, the prevalence of guilty pleas explainable does not necessarily validate these pleas for the system which produces them; but we cannot hold that it is unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the state and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind which affords hope for success and rehabilitation over a short period of time than might otherwise be necessary."

'In order words, the man who pleads guilty indicates a frame of mind that he owes a debt to society, and it's going to take a very little time to rehabilitate him.'

'A man who comes in and demands all his constitutional rights and says he is innocent and denies the crime, if he is found guilty, the United States Supreme Court indicates it may take a longer period of time to rehabilitate him.'

'And the Court follows that philosophy, too.'

"That is not an accurate statement of the law of Michigan. In *People v. Earegood,* 383 Mich. 82, 83, 85 (1970), the 'defendant appeared before the trial judge at which time a call of the criminal calendar took place. On that occasion, the judge made the following statement:

'I think it is about time to make my usual announcement, gentlemen. The purpose of this call is to get pleas. If you are going to plead or waive a trial by jury now is the time to do it, so we can schedule. The Court has a long memory, and all this goes on record, and when it comes time for sentence, if you plead or waive a jury at

> the last minute, *it is a factor I take into consideration in sentencing.* I am sure you all know the risk.' (emphasis supplied)"

Defendant later plead guilty and appealed. The Supreme Court remanded for resentencing, saying:

> '[I]t is impermissible for a judge in imposing sentence to take into consideration as a factor in determining the term of the sentence the fact that the defendant pled or waived a jury at the last minute.'

"In *People v. Snow,* 386 Mich. 586, 592 (1972), which followed *Earegood,* the 'essential issue,' as stated by the Michigan Supreme Court, was:

> 'Is the sentence of a trial court illegal if it was made harsher as a result of appellant's exercising his constitutional right to trial by jury and right not to plead guilty?'

The Court replied affirmatively and once again remanded for resentencing.

"The law in other jurisdictions is in accord. In *Scott v. United States,* 419 F.2d 264, 267 (C.A. D.C. 1969), the sentencing judge stated that he did not believe the defendant, Scott, that he believed that Scott had deliberately lied and if Scott had pled guilty he might have been more lenient. Later the judge said, 'I hope sometime I hear some defendant say, "Judge, I am sorry, I am sorry for what I did". That is what I have in mind.' The Court of Appeals for the District of Columbia Circuit reversed, saying that Scott's refusal to admit his guilt and to show remorse was not a factor which the judge could properly take into consideration in imposing sentence.

"The *Scott* Court referred to an earlier opinion of the United States Court of Appeals for the Fifth Circuit, *Thomas v. United States,* 368 F.2d 941, 946

(C.A. 5, 1966), where the sentencing judge stated that if the defendant would 'come clean and make a clean breast of this thing for once and for all, the Court will take that into account in the length of sentence to be imposed.' The defendant persisted in protesting his innocence and was sentenced to serve a term of 25 years. In reversing, the Fifth Circuit declared:

> 'When Thomas received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty for exercising his constitutionally guaranteed right.'

"Judge Leventhal, in a perspicuous concurring opinion in *Scott,* took an intermediate view (p. 282):

> 'It is not easy for me to define why I concur in a judgment of remand. There is a natural, and I believe sound, disposition to adjust sanctions when an offender admits his responsibility. This blends in with a readiness to accept the conclusion that such a person has the stuff that portends future improvement. I dare say that many judges, possibly the overwhelming majority, respond in this way, and I am not ready, at least as of this writing, to say that their approach is inadmissible. The wellsprings of human experience are known to every parent concerned with bringing up children, and who has invoked, consciously or not, Parson Weems' account of George Washington and the cherry tree.
>
> 'What we have before us is the difference of degree that amounts to a difference in kind. There is a line between responding favorably to an individual's sincere expression of remorse, and reacting in a hostile way because of a personal belief in the guilt of one who maintains his innocence and seeks review of the judgment.'

"Should the defendant be convicted once again on retrial, the sentencing judge may not take into consideration the fact that the defendant chose to exercise his right to a jury trial." (*People v. Bottany, supra*).

It is significant that Judge Levin observed the following in *People v. Bottany, supra,* at fn. 6:

"The District of Columbia Circuit, in adopting the reasoning of the Fifth Circuit, said that *Scott* (p. 268) 'could reasonably have believed that he could show penitence—real or affected—only at the price of prejudicing his appeal, if not worse. Whether the trial judge intended or not "to bargain thus with the defendant" we conclude that "the court was without right * * * to put a price on an appeal".' "

"Similarly, see *O'Hara v. People,* 41 Mich. 623, 624 (1870), where the Michigan Supreme Court said:

'When a convicted person is brought up for sentence he has rights still, and it is specially incumbent on the judge to take care that they are fully observed and protected. No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him, and any attempt cannot fail to be reprobated. Standing at the bar to receive judgment the law surrounds him with its protecting principles and intends that his sentence shall be the reflection of its justice and as far as possible free from all taint of human frailty.'

"The *Scott* Court also rejected the argument that the judge could impose additional punishment because the defendant had committed perjury, saying that if the government wished to prosecute Scott for the independent substantive offense of

perjury it could do so and that in such a proceeding he would be entitled to all the protections of a criminal trial. Similarly, see *People v. White*, 267 N.E.2d 127 (Ill. App. 1971), where the sentencing judge stated that the matter was 'more aggravated by the circumstances of perjury and so forth.' In remanding for resentencing the Illinois appellate court declared that a sentencing judge may not take into consideration his belief that the defendant perjured himself when he testified at his trial because the defendant is entitled to a trial for perjury before he can properly be punished for committing that offense."

Finally, it should not matter that Payne's attorney did exercise allocution at the second sentencing (P.C. 62) and that Michigan law prohibits an increase of sentence premised on the absence of remorse, *People v. Bottany*, *supra*, for Circuit Judge Hadsell, upon imposing the minimum and maximum terms of Payne's first sentence, considered the possibility that Payne might lose his sense of remorse, stating: "The sentence that I am about to impose on you will give you hope of returning to society after a—what I consider a reasonable length of time, *providing that you are honestly desirous of reformation* . . ." (P.C. 61, emphasis added).

Thus it should be quite apparent that the absence of expressed remorse should have played no part in Judge Byrns' decision to increase Payne's sentence following reconviction.

B. In the Absence of the State of Michigan Asserting Any Valid Reason Justifying the Increased Sentence the Conclusion Is Inescapable that Judge Byrns Vindictively Punished Payne for Exercising His Right To Appeal.

As is apparent from argument, IIA, *supra,* the State has not asserted any constitutionally legitimate reason for increasing Appellee Payne's sentence. In the absence of any justifiable reason for increasing the sentence, it must be concluded that such an increased sentence was unwarranted, vindictive, and punishment for the assertion of a right to appeal. As Judge Thomas M. Burns noted in dissent in *People v. Payne,* 18 Mich. App. 42, 47 (1969):

> "The selfserving declaration of the sentencing judge that he was not imposing a harsher sentence because defendant had appealed and that he was giving the defendant credit for time served does not change the practical realities of the situation."

Only under the rarist circumstances would a sentencing judge state for the record that he is punishing a defendant for exercising his right to appeal. Necessarily, then, vindictiveness must be shown by an analysis of the circumstances surrounding the imposition of the increased sentence.

The absence of valid reasons justifying an increased sentence is the situation dealt with in *Pearce.* It is clear that a stated purpose of vindictiveness would require vacation of such a sentence. However, *Pearce* was not intended to remedy this situation. *Pearce* was specifically designed to remedy the situation where no constitutionally legitimate reasons are given for the increased sentence.

In pre-*Pearce* situations the reasons for the increased sentence are obtained by the record supplementation procedures as utilized in this case below and, for example, in *Moon, supra, Odom, supra,* and *Commonwealth v. Allen, supra.* In the post-*Pearce* situation the reasons must clearly be made part of the record at the time of sentence imposition.

Therefore, when *Pearce* is applied and no constitutionally legitimate reasons justifying the increased sentence are found, it must be presumed that the sentence was vindictive and was punishment for the assertion of a constitutional right.

III.

IF *PEARCE* IS HELD NOT APPLICABLE, THIS CASE SHOULD BE REMANDED TO THE MICHIGAN SUPREME COURT FOR A DETERMINATION OF PAYNE'S DUE PROCESS CLAIMS UNDER THE CONSTITUTION OF THE STATE OF MICHIGAN.

The Michigan Supreme Court in its opinion, *People v. Payne,* 386 Mich. 84, 97 (1971), stated that because of their disposition of the case under *North Carolina v. Pearce, supra,* they were not considering Payne's due process arguments under the Michigan Constitution, Michigan Constitution of 1963, Art. 1, § 20.

It is also important to note that Payne's case was pending on appeal at the time Pearce was released. [See argument ID, *supra*]. On appeal in the Michigan Court of Appeals, Payne raised the question of whether his due process rights had been violated. His case was based on prior Michigan authority, *People v. Mulier,* 12 Mich. App. 28 (1968). In the majority opinion, the Michigan Court of Appeals found *Mulier* did not control this case because

the second-sentencing judge had the opportunity to learn facts about the crime which the first sentencing judge had not known, *People v. Payne*, 18 Mich. App. 42, 45. As we have shown in Argument IIA, *supra*, this was erroneous.

Therefore, if *Pearce* is found not to apply to the case, because the Michigan constitutional issue was not treated by the Michigan Supreme Court and because the Michigan Court of Appeals was factually erroneous in its finding that *Mulier* did not apply, this case should be remanded to the Michigan Supreme Court for a further determination.

Because Appellee has shown that there is an independent state grounds for the vacation of his second sentence, this case should be remanded for such a determination. This procedure comports with the procedure adopted in *Aikens v. State of California*, 406 U.S. 813, 32 L.Ed.2d 511, 92 S.Ct. 1931 (1972).

CONCLUSION

The Michigan Supreme Court should be affirmed by holding *North Carolina v. Pearce* retroactive and controlling of this case. In the alternative this case should be remanded to the Michigan Supreme Court for a determination of whether there exists independent State grounds for reversal.

Respectfully submitted,

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*We wish to acknowledge the assistance of Alan D. Smith in preparation of this brief.

APPELLEE'S APPENDIX "A"

TRANSCRIPT OF HEARING ON APPELLEE'S MOTION FOR PRODUCTION OF PRE-SENTENCE REPORT

STATE OF MICHIGAN
In the Circuit Court for the County of Berrien

PEOPLE OF THE STATE OF MICHIGAN	)
vs.	) Case No. X-751
LEROY PAYNE	) Date: December 18, 1972
Defendant	) Action: Motion to Produce Pre-Sentence Report

APPEARANCES:

HON. CHESTER J. BYRNS, Circuit Judge

Atty. John Smietanka, Asst. Prosecuting Atty.

Atty. Dennis Benson, Atty. for Defendant

THE COURT: This is the matter of the People of the State of Michigan v. Leroy Payne, which in Berrien County has the number X-751, and this case now is before the United States Supreme Court, whose number—if I'm wrong, I will stand correction—is 52618-½.

MR. BENSON: No, I believe that is the Michigan Supreme Court number.

THE COURT: That is the Michigan [2] Supreme Court.

MR. BENSON: The Supreme Court number is 71-10050.

THE COURT: All right. Thank you. This afternoon representing the People in this matter is the Chief Assistant Prosecutor, John Smietanka, and representing the Petitioner, Mr. Payne, is, excuse me, Mr. Dennis Benson of the State Appellate Defender's office.

The record should show that the State Appellate Defender's office through Mr. Benson, who is an assistant defender, has filed a motion or a petition with this court for the court to make disclosure of and production of the pre-sentence report on Leroy Payne.

I'm going to regard this in a broader sense that you are asking for not only the original pre-sentence report when he was first convicted and sentenced, but also the second one.

MR. BENSON: The motion, I think, your honor includes both pre-sentence reports.

THE COURT: All right. The prosecutor through Mr. Smietanka resists the motion.

The record should show that off the record there has been considerable argument between counsel [3] in the presence of the court, each maintaining their various points; that further Mr. Benson has filed a memorandum of law in support of his motion, which I have read, and unless there's something further, the court is ready to rule on the particular matter.

MR. SMIETANKA: Nothing further.

THE COURT: Nothing further. The court makes reference to Michigan Compiled Laws Annotated 791.229, reading in part as follows:

> "All records and reports of investigations made by probation officers, whether state or local, for courts of criminal jurisdiction in cases referred for such investigation by such courts, and all case histories of probationers are hereby declared to be privileged or

confidential communications not open to public inspection. Judges and probation officers shall have access to such records, reports and case histories. The probation officer or the assistant director of probation, or his representative shall permit the attorney general, the auditor general and law enforcement agencies to have such access. The legislative intent is that the relation of confidence between the probation officer and probationer or defendant under investigation shall remain inviolate."

[4] The State Appellate Defender, with all due respect and credit to it, is neither a judge nor probation officer nor police officer or auditor general, etc.

MR. BENSON: Your honor, for the record, if I may, I'd like to say that I did inform the court of our position on Malkowski, People v. Malkowski.

THE COURT: It's in your record.

MR. BENSON: The recent case of the People v. Chappell.

THE COURT: Your memorandum and law are here, and now the court is disposing of it by way of opinion.

This court does not read as mandatory in this state the furnishing to a defendant or an appellant or his counsel the pre-sentence report. I say this not because there is anything this court is trying to hide in these pre-sentence reports. This court has followed a policy generally in sentencing to tell the defendant exactly what it is in the pre-sentence report that has influenced him and to give the defendant the opportunity to explain or to correct.

In the matter of Payne, to the best of this court's memory, this court set forth at the time of sentencing the reason why the sentence the court was giving to Mr. Payne [5] was what it was, which also has been supplemented by an affidavit or affidavits by this court

subsequently. This court at that time noted that as far as it knew his record while in confinement was good and that was what prevented this defendant from having even a longer sentence, but this court, as I remember, without going into what is already part of the record, was greatly influenced by the brutal details of the crime which it had over three days, plus its own impression of the defendant during these days, plus its impression of his testimony during those days of trial.

Now, I do not read the cases cited by Mr. Benson as mandatory in this state that trial judges make available to the defendant or appellant or his attorney any part or all of the records. There is a confidential relationship, as the statute shows, and this is one statute that actually expressly states what the legislative intent is, and that confidential relationship is between the probation officer and the defendant. The defendant might be willing to waive this confidential relationship, but not so the probation officer who deals with the defendant's family, his employers, his friends, the victims of his crime, law enforcement agencies, and because people know that the information that they supply to a pre-sentence officer is [6] privileged and confidential, they are willing to give such information, but once they know that that no longer is privileged and confidential, they are not going to give it to the pre-sentence officer or, as he's also known, as he wears two hats, the probation officer.

It would take a direct ruling by the legislature changing its own statute or by the Supreme Court in the name of judicial interpretation changing the statute for this trial court to make available to anyone other than those authorized in this statute a pre-sentence report.

It is this court's opinion that if such a rule came out, that this would be the most damaging thing that could

happen, and one might say to society, but, no, I would say to the defendants because it is from these pre-sentence reports that the judge is able to get an understanding of the character of the individual involved, an understanding of what is the best disposition for him, and without these reports being confidential, a judge will be shooting from the hip, which was something that many years ago before any of us were practicing law was avoided when the pre-sentence system began. So those that fight—I don't mean you personally, Mr. Bensor, for I have high regard for you—for those who fight to say to make pre-sentence reports [7] available in the name of due process, in the name of kindness or whatever other name that you want to use or clause that you want to claim, actually will do harm. Pre-sentence reports as a result of such a ruling or such a directive, I think, would probably turn out to be very brief and not helpful to either the court or the defendant or the community or anyone else.

It would be very easy for me in this matter of the People v. Payne to say to you—and you made this nice trip here and I appreciate it and I'm glad you made it in such a beautiful day, not in the snowstorm—"Go and take these reports because, after all, this matter is in the United States Supreme Court; they're working on it; there's nothing in those reports that I'm afraid of or that I'm trying to conceal," but once I do that, then I have violated what I believe to be the law in this state.

This court is mindful of the fact that over a year ago the Supreme Court of Michigan put out a proposed rule that was going to make these pre-sentence reports available and is also mindful of the fact that practically every sentencing judge in the state objected, and the

Supreme Court has never published or made that rule of a year and a half ago, proposed rule, never made it effective, which would [8] indicate to me that that Supreme Court is interpreting this as not mandatory. If they publish the rule, then they must take the responsibility from the standpoint of the defendants, the courts and society for that rule. That is not for me; I don't have that responsibility, but I do have the responsibility to apply this law and the tradition and the custom which I know has always existed in this state, and even though it would be easy in the Payne case to overlook it, I cannot do it.

Now, if the United States Supreme Court or any judge above this court orders those records produced, it seems to me under the statute they have the right to do it and there wouldn't even be any need to ask me for it; they can just send for it; they can have it and then they take the responsibility for either giving their own interpretation to this legislative intent which says that the preservation of the relationship of confidence between the probation officer and the defendant must remain inviolate; that they have in the name of legislative interpretation violated that intent, which is their privilege, and they have done their own legislating or in the name of due process providing that this provision is unconstitutional, but I don't think it is looking at its broad aspects. If it was a matter of dis-[9]cretion with this court, I still would not grant it because I think greater evil and harm will come from it.

So I will deny at this time the motion brought by the Appellate Defender on behalf of Mr. Payne, and he may make such appellate review of this as he wishes, and the prosecutor will prepare a brief order to this effect.

MR. BENSON: I have one.

THE COURT: Or if there is one here, I want that order to show that an opinion was given from the bench and I want that opinion to be part of this ruling so that if somebody is reviewing it they know this is not—this word "vindictive" I have heard all during the Payne matter instead of the word "principle," but they won't feel I am a vindictive old man, which I hope I'm not.

MR. BENSON: Your honor—

THE COURT: Yes.

MR. BENSON: If the transcript of the proceedings is needed, can we obtain one then?

THE COURT: Off the record. (Discussion off the record.)

THE COURT: Of course, Mr. Benson, of the Appellate Defender's office may buy such a copy, and the court reporter will be glad to make a copy of it.

APPELLEE'S APPENDIX B
EXCERPTS FROM TRIAL OF LIONEL BRADFORD
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[2] VICTOR YOST

A witness called by and in behalf of the people, being first duly sworn, was examined and testified on his oath as follows:

[3] DIRECT EXAMINATION

BY MR. LANGE:

Q. Will you state your name, please? A. Victor Yost.

Q. Where do you live, Mr. Yost? A. Berrien Springs.

Q. What is your occupation? A. Deputy sheriff.

Q. And how long have you been a deputy sheriff in this county? A. 18 years.

* * * * *

Q. And on the day in question, the 5th day of November 1962, were you with anyone else, any other officer? A. Yes, I was.

Q. And who was that officer? [4] A. Special deputy Charles Plummer.

Q. And at about 3:45 A.M., where were you in connection with your duties as a police officer of this county? A. I was on M-139 and Napier Avenue.

Q. And you were in an automobile, I take it. A. I was.

Q. What kind of a car was it? A. A 1961 Plymouth, I believe.

Q. And is it a regular marked patrol car? A. No, it is unmarked.

* * * * *

Q. Were you driving the car on that occasion? A. I was.

Q. Where was Officer Plummer riding? A. A passenger in the front seat.

Q. Will you tell the court and jury in your own words what happened, beginning there at the intersection of M-139 and Napier Avenue? [5] A. I was checking out Louie's Tavern.

Q. Will you describe what you mean by "checking out?" A. Well, it had been burglarized a week prior, a burglary there, and I checked it to see if the building was secured, and when we found out it was, we started to leave the building, or the front of the driveway. The building was secured. I started to turn around and head back towards the Harbor.

Q. What happened then? A. I observed a car coming from across the front of me. My headlights shown on the car, and I proceeded to follow that vehicle.

* * * * *

Q. Do you recall the route by which you followed it? A. Yes. I followed it north on M-139 to Pipestone Road. There, it turned into the city and I proceeded to follow it.

Q. Approximately how closely were you following this car? A. Well, it varied at times. As I followed it I was throwing [6] the spotlight on the buildings along 139, and we got as far as maybe six or eight feet away, to 25 to 30 feet away.

Q. Did you attempt to stop this automobile? A. I did.

Q. And approximately where did that take place, Officer? A. It was in the city of Benton Harbor, near the Mercy Hospital. I imagine two blocks from the Mercy Hospital, towards the city, towards the business district.

Q. That would be north of Mercy Hospital? A. Yes.

Q. And will you tell the court and jury what was done by you and Officer Plummer to stop this Pontiac automobile? A. I pulled up alongside of it and sounded the siren and threw a spotlight on it. Also, Plummer had a

hand red light that plugged into the cigarette lighter, and he put it in the driver's window, and the car started to stop, and we stopped, too.

Q. After the Pontiac automobile stopped, Officer, where, in relation to the Pontiac, did you come to a stop? A. I was in back of it, I would imagine 3 or 4 feet, and before I got out of the car I put my spotlight through the rear window, which is quite customary.

Q. That was the spotlight that was built into the automobile? [7] A. Yes, sir.

Q. And did you notice anything as you shined the spotlight into the rear window of the Pontiac automobile? A. Yes, I did.

Q. What did you see? A. I seen two subjects in the car.

Q. What direction were they facing at that time? A. Well, they were—when I first stopped they were both facing towards the front of their car, but the one turned around and looked.

Q. Which one turned around and looked? A. The passenger.

Q. Now, Officer Yost, I ask you to tell the court and jury whether or not that man is present in court here today. A. He is.

Q. Where is he? A. He is on the right side of his counsel.

Q. Now, Officer Yost, after you made the observation that you just testified about, in the light of the spotlight, what happened then? A. I proceeded to get out of the car; also Plummer, and as I neared the front of my car the driver jumped out and started shooting at me.

Q. Did you have your gun drawn as you approached the car? [8] A. No, I didn't.

Q. Did you have anything in your hand? A. Nothing.

Q. Did you make an observation of Mr. Plummer going up to the other side of the car? A. I seen him going up to the side.

Q. Do you know whether or not he was carrying any arms? A. Nothing, I believe, other than a flashlight, which I had, also.

Q. You had a flashlight also? A. I did.

Q. Did you use the flashlight? A. I didn't get a chance to use anything.

Q. And you say suddenly the door opened? A. It did.

Q. Then what happened? A. A fellow jumped out of the car, and I seen the gun, I suppose, at the time, starting off, and I threw myself sideways, and I went down in a hail of bullets.

Q. Do you know how many times you were struck with shots on that occasion, Officer? A. Four times.

Q. You fell, naturally? A. I did.

[9] Q. What do you remember after you had fallen to the ground? A. I seen the car driving away, and—or I observed this man that shot me running around, and I was lying on the ground. I tried to get my service revolver out, but I was hit in the left arm, and I am left-handed, and it rendered it useless. I finally got my gun with my right hand, and I shot, but where, I hit, I am not sure.

Q. You did fire a shot? A. I emptied my gun.

Q. Do you recall seeing Charles Plummer after you had been shot? A. Yes.

Q. What happened in that connection? A. Well, I heard Plummer say, "Give me your gun. This man is coming back," and the man wheeled then and ran back to his car and drove away, and I told Plummer to chase him; not to let him get away.

Q. Do you know whether or not Officer Plummer did then leave the scene? A. Yes, he jumped in the car, as I directed him to do, and chased the car.

* * * * *

[11] CROSS-EXAMINATION

BY MR. McQUILLAN:

* * * * *

[20] Q. Now, between the time of the shooting on November 5th, and December 20th when you identified Mr. Bradford, isn't it true that you had occasion to read newspaper accounts of this incident, the shooting incident? A. Oh, I suppose.

Q. And isn't it true that in so doing you observed Mr. Bradford's picture in the paper, as one of the suspects? A. I don't know. I don't think I seen a newspaper until long after I was out of the hospital.

Q. And do you recall when you were discharged from the hospital? A. I am not sure, but I think I was there 18 or 20 days.

Q. That would be right around Thanksgiving time then. A. Yes.

* * * * *

[26] LUTHER ZICK

A witness called by and in behalf of the people, being first duly sworn, was examined and testified on his oath as follows:

[27] DIRECT EXAMINATION

BY MR. LANGE:

Q. Will you state your name please? A. Luther Zick.

Q. What is your occupation? A. A physician and surgeon.

Q. Where do you reside, Dr. Zick? A. St. Joseph.

* * * * *

Q. And were you practicing your profession on the 5th of November of this year? A. Yes.

Q. And on that day, in the course of your practice of medicine and surgery, did you have occasion to examine and treat one Charles Plummer? A. Yes, I did.

Q. And do you recall the circumstances under which you [28] first came into professional contact with him? A. Yes. It was early in the morning. I had a call around about four in the morning from the emergency room at Mercy Hospital. I was asked to come down there and see Mr. Plummer because he had been shot, and in my amazement I wondered why and how, but I said, "Fine, I will be there." So we got down there to the emergency room. Mr. Plummer was lying on the examining table in the emergency room at Mercy Hospital. He was conscious, cooperative. He had two bullet wounds; one through his right shoulder. It was fortunately a flesh wound. It had formed a tunnel, a through-and-through tunnel through his right shoulder. That did not concern us so much as the second wound. There was a bullet hole in his left flank, and while there was an entrance wound, there was no wound of exit, so we knew that he had a bullet in him. He was taken to X-ray and the bullet was seen to be very deeply placed, either adjacent to or actually within the spine. This was early in the morning, about 6:00. We went into the operating room, and I assisted with the care of Mr. Yost, and later in the morning we went ahead and took Mr. Plummer to surgery, and at surgery Mr. Plummer had the bullet, as shown on the X-ray, lodged within his 4th lumbar vertebra.

[29] Q. That is part of the spine, is it not? A. Yes. And he is actually most fortunate to be here. An inch forward and he'd have hit his large vessels and he'd have bled to death. An inch posterior to that point and he'd have been paralyzed, so he was just lucky.

Q. Was that bullet removed? A. Yes, it was removed.
Q. Who did the removal, Doctor? A. I did.

* * * * *

[32] CROSS-EXAMINATION

* * * * *

Q. I see. Now, after the surgery that you performed on Officer Plummer, was he then returned to a hospital room. A. Yes, he was. Actually, they are usually taken to the recovery room, which is, of course, a hospital room, but not his room. After they recover, they are then taken to their own room.

Q. And how long did Mr. Plummer remain in the hospital, do you know? A. It was about a week.

Q. And how long after the surgery did Mr. Plummer regain his faculties, if you know? Continuing the question, first of all, as I understand it, he was operated on early Monday. A. Yes. We actually had him sitting up that evening, and we had him standing the next day, and he began walking around. We try to encourage early ambulation.

Q. And would you state that in this case he did regain his faculties relatively soon after the shooting then? A. I would say that he did very well.

MR. McQUILLAN: Thank you,

* * * * *

[34] REDIRECT EXAMINATION

* * * * *

Q. Doctor, can you describe in a little bit more detail these two wounds on the body of Charles Plummer? Let's take the shoulder wound, the through-and-through wound first. Where was it located? A. It was located right over the point of the shoulder. In fact, if it had been out,

if the bullet had gone out several inches laterally, it would have missed him. Conversely, of course, if it had gone in several inches more, medically, it would have gotten him in the base of the neck, which would have been a very serious wound.

Q. Can you describe the approximate size of the wound for the court and jury? A. Well, there was a tunnel that was probably an inch and a half to an inch and three-quarters long. At its greatest depth it was probably half an inch.

Q. And that would be then the so-called shoulder wound? A. Yes.

Q. It actually tunnelled through the flesh? A. Yes.

Q. And how about the other wound? Where would that have been located? A. The other wound was located in the left flank. There was [35] only one wound there, the one of entrance, with no wound of exit, as mentioned before.

Q. Can you describe the approximate size of that wound to the court and jury? A. Yes. That wound would be probably just a little under—between three-eights and a half an inch, I would say.

MR. LANGE: I have no further questions.

RECROSS-EXAMINATION

BY MR. McQUILLAN:

Q. As I understand you, Doctor, then it did appear to you that both wounds were approximately the same size? A. I would say so, yes.

* * * * *

[37] LEROY PAYNE

A witness called by and on behalf of the people, being first duly sworn, was examined and testified on his oath as follows:

[38] DIRECT EXAMINATION

BY MR. LANGE:

Q. Will you please state your name? A. Leroy Payne.

Q. And how old are you, Mr. Payne? A. 23.

Q. And you are presently an inmate of the county jail? A. Yes, I am.

Q. Now, Mr. Payne, you have been charged and have pleaded guilty in this court to the crime of assault with intent to murder Officer Yost, is that correct? A. Yes.

Q. And did you have counsel in connection with that plea of guilty? Did you have a lawyer? A. Yes.

Q. What was the lawyer's name? A. Attorney Brown.

Q. And did Attorney Brown discuss with you at the time of your plea of guilty to the charge, or after your plea of guilty to the charge, your constitutional rights under the Fifth Amendment of the United States Constitution? A. Yes, sir.

* * * * *

[44] Q. Did you and Mr: Bradford have any conversation about your gun? A. Well, when I came into the house he asked me if I had my pistol.

Q. And what did you tell him? A. "Yes, sir," I did.

(Whereupon people's exhibit 3 was marked for identification.)

Q. Now, Mr. Payne, I show you this pistol which has been marked and tagged as people's proposed exhibit 3, for the purposes of identification, and I ask you to look at it and tell the court and jury if you recognize it. A. Yes, it looks like the gun that he had then.

(Whereupon people's exhibit No. 4 was marked for identification.)

Q. I show you this gun which has been marked as people's proposed exhibit 4, for purposes of identification, and I ask you to look at it and tell the court and jury if you recognize this gun. A. Yes.

Q. What is it? A. That's the pistol that I had.

Q. That is the pistol you had on the night we are talking about? [45] A. Yes, sir.

Q. Now, Mr. Payne, after you and Mr. Bradford had this conversation at his home relative to these guns, what happened then? A. Well, we left his house and got into my car.

* * * * *

Q. And where did you go? A. We headed towards South Bend.

Q. And how far did you get on the way towards South Bend? A. We went all the way to South Bend, sir.

Q. You and Mr. Bradford? A. Yes.

Q. And then what happened after you got to South Bend? A. We tried to break into a place called "Smoky's Grill" there in South Bend.

Q. Do you recall where Smoky's Grill was located? A. On Chapin Street.

Q. Were you able to do so? [46] A. Yes, we got into the place and tried to get the safe open, and a tear bomb went off inside the safe and we had to leave.

Q. A tear-gas bomb went off after the safe was opened? A. No, while we were trying to get the safe open.

Q. Then what did you and Mr. Bradford do? A. We left and headed back towards Benton Habor.

Q. Did you stop on the way to Benton Harbor? A. Yes, sir.

Q. And where did you stop? A. Oh, I think M-139, by Robert Hall's out there.

Q. By Robert Hall's? That is the store? A. Yes.

Q. And what did you do after you stopped the car near Robert Hall's store? A. Well, we parked the car in front of an automobile wreckage place, and went across the street and broke into Robert Hall's.

Q. Will you describe, Mr. Payne, to the court and the jury how entrance was made into the Robert Hall store? A. Through a side rear door.

Q. And was it necessary to use any tools in connection with this breaking and entering? A. Yes. We had to use two crowbars and a screwdriver.

[47] Q. And when you say "we," who was the other person or persons to whom you are referring? A. Lonnie Bradford.

Q. And after entrance was gained into the Robert Hall store, what, if anything, did you do? A. We grabbed quite a few clothes, and headed back towards the car.

* * * * *

Q. Who was driving the car away from the vicinity of the Robert Hall store? A. I was.

Q. And where was Mr. Bradford seated? A. Beside me, in the front seat.

Q. And what highway did you drive on? [48] A. M-139.

Q. And do you recall in what direction? A. Heading towards Pipestone.

Q. That would be towards Benton Harbor? A. Yes.

Q. Did you see a car commence to follow you? A. Yes, sir. At the red light there by the Plaza, a car made a U-turn from a straight, I guess it is there, and came in behind us.

* * * * *

[49] Q. Now, after you got on to Pipestone Street, what happened? A. Whem I made a lefthand turn off of M-139 to Pipestone, the car behind us made a turn, too. Lonnie Bradford asked me if the car was still behind us, and I told him, "Yes," and we continued on down Pipestone past Mercy Hospital about a block and a half or so, and the car behind us, the police car, put it's spotlight

in our back window and blinked his headlights and pulled us over, and I stopped.

Q. Mr. Payne, during the time that this car was following you, did you have any conversation with Lonnie Bradford about this car? A. Yes, sir.

Q. And what was that conversation? A. He asked me if the car was still following us, and I told him, "Yes."

Q. Then what did he say to you, if anything? [50] A. I don't remember him saying anything.

Q. Did you and he say anything about the guns at that time? A. We had talked previously about guns.

Q. You had talked about it previously that evening? A. I don't know if it was that evening. I think it was that evening that we talked about guns.

Q. What was said in that conversation? A. He said that he didn't intend to be taken, and that he would put five bullets in the same place before he would be taken.

Q. He would put five bullets in the same place? Is that what he said? A. Yes.

Q. Now, Leroy, as this police car came up to you, you said it shined its light. A. Yes.

Q. Do you recall what kind of a light it was? A. A spotlight, in the rear window of the car. It went back and forth, and then pulled up about half way of the car, and then fell back again.

Q. And this was on Pipestone Street? A. Yes.

Q. And you stopped the car? A. Yes.

[51] Q. What happened then? A. I don't know which one of us spoke at the time, but I seem to remember that it was said that "This is it," or something like that.

Q. The words "This is it," was spoken by one of you? A. Yes.

Q. And then what happened? A. The two detectives got out of their car and were walking up to my car, and

Lonnie Bradford and I jumped out of the car, firing at them.

Q. You jumped out of the car and fired at them? A. Yes.

Q. Can you tell the court and jury approximately how far away from you the detective on your side of the car was when you fired at him? A. When I got out of the door, he was a little past my rear fender.

Q. Did you watch what happened on the other side of the car? A. No, sir.

Q. Did you hear shots? A. Yes, sir.

Q. Did you hear any shots other than those that you fired? A. Yes, sir.

Q. Do you recall how many you may have heard? [52] A. No, I don't know.

Q. After you fired your first volley of shots, Leroy, what happened next? A. I turned around and started to get back into the car, and I was half in and half out, and I put my foot on the gas and I turned around, and I don't know—I got back out of the car.

Q. What did you do when you got back out of the car the second time? A. I started to walk back, I guess. I don't know for sure. I know I got out of the car, and I don't know how far I went, or what.

Q. Did you fire at anyone the second time? A. I don't recall, sir.

Q. Do you recall, Mr. Payne, whether or not any officer fired at you, or pointed a gun at you that evening? A. During this time, sir?

Q. Yes. A. Yes.

Q. And can you describe that, what happened, to the court and jury? A. When we started to fire, Mr. Yost, the detective, he started to fall back, and it seems to me he swung his right hand back like that (indicating) to reach

for his [53] gun, and the next thing I knew he was on the ground, and the other detective on the other side, I remember him firing, but I don't know exactly when.

Q. You remember him firing at you? A. When I got out of the car the second time, I remember I was standing there, and it seemed as if an explosion went off, or a fire was right in my face, and I remember thinking that–I don't know exactly.

Q. Did you hear a click as he had this gun in your face? A. I didn't hear anything, sir, but I did see this flash. It seemed like as if it was right in my face there.

Q. Were you injured? A. No.

Q. Now, Leroy, after this incident when you got out of the car the second time, what did you do? A. I turned around again, and half in and half out of the car, and pressed down on the gas, and made a lefthand turn at the first street I came to.

Q. And what did you do as you turned left onto this first street that runs into Pipestone? A. I went down one block, made a righthand turn, and another righthand turn into the alley there.

Q. What did you do as you drove up the alley? A. I pulled in behind a brick building.

[54] Q. Were your headlights on, or off, as you drove up the alley? A. Off.

Q. You pulled in behind a brick building, and what did you do there? A. I took all the clothing and the burglary tools out of the car.

Q. Do you recall where you placed the clothing? A. Beside this building.

Q. And what did you do with the tools? A. I placed them across the alley beside a garage.

Q. Then what did you do with your car, if anything? A. To my car?

Q. Yes, or with your car. Did you leave it there? A. Yes, I left it there.

Q. Then what did you do? A. I started running, after I left there.

* * * * *

[55] Q. And then what did you do? A. I went across Pipestone, and went two houses, and down into a ravine.

* * * * *

Q. And did you see Lonnie Bradford in that ravine? [56] A. Well, when I came down to the water I didn't know whether to cross it or not. It looked pretty deep, and I heard someone splashing along, and I called out to Lonnie Bradford and told him, "Don't shoot."

Q. And then what happened? A. I went out to where he was and give him my pistol, and kept on going across the ravine, and headed towards home.

Q. I show you the pistol marked people's exhibit 4 for identification, and ask you if this is the pistol you just testified about having given to Lionel Bradford. A. Yes, it is.

Q. After you gave your pistol to Lionel Bradford, where did you go? A. I headed towards home. I went up the other side of the ravine, and I don't know exactly the name of the street I came out on, but I headed towards Fair on the street, and about half a block before I hit Fair, I went down an alley parallel to Fair until I came to the Project.

Q. Is that where you live? A. Yes, sir.

* * * * *

[60] Q. Were you fired at, Mr. Payne, as you drove away from the scene and down this street to the left? A. No. Well, when I was driving away, yes, but not after I made the left turn.

Q. You were fired at as you were going north on Pipestone, but as you made the left turn you weren't fired at any more, is that correct? A. Yes, sir.

Q. Now, Mr. Payne, were you subsequently arrested that morning? A. Yes, sir.

Q. Approximately what time were you arrested? A. About 4:30, sir.

Q. And were you sleeping at the time you were arrested? A. No, sir.

Q. Do you know what officers arrested you? A. No, sir.

Q. Can you tell the court and jury approximately how many officers arrested you? A. I guess about 15 or 20, I guess. I don't know for sure.

Q. It seemed like an awful lot of them? [61] A. Yes, sir.

Q. Where were you taken, Mr. Payne, after you were arrested? A. To the Benton Harbor police station.

Q. And were you taken from the Benton Harbor police station to any other place that morning? A. To Mercy Hospital.

Q. And what, if anything, happened at Mercy Hospital? A. I was taken in with another fellow for Mr. Yost to identify.

Q. Do you know who the other fellow was? A. I think they called him Jim Beam.

Q. And what happened there at the hospital? A. Somebody asked Mr. Yost if I looked like the fellow that had shot him, and he said that I looked like the fellow, but he didn't know for sure.

Q. He said you looked like the fellow that had shot him, is that correct? A. Yes.

Q. After that, what did the officers do with you? A. Took me back to the Benton Harbor police station.

Q. And what happened at the Benton Harbor police station, Mr. Payne? A. I was taken into the detective room there.

Q. What happened at the detective room at the Benton Harbor [62] police station? A. Det. Smith came in, and after a while, after I'd been there a while.

Q. What did Det. Smith do after he came in? A. He sent the other patrolmen out that was in the room, and told me, he says, "You are going to tell me the truth or I'm going to beat the living daylights out of you."

Q. All right, then what happened, Mr. Payne? A. I told him I didn't know anything to tell him.

Q. Then what happened? A. He started beating me in the face.

Q. He struck you? A. Yes, sir.

Q. Struck you on several occasions, is that right? A. Yes, sir.

Q. And then were you later taken from the detective room? A. Yes, sir.

Q. And where were you taken? A. To the county jail.

Q. Do you recall what officers took you from the Benton Harbor police station to the county jail? A. I remember Det. Casserly bringing me over. I don't know if there were any other officers.

[63] Q. And after you were brought over to the Berrien County jail, where were you placed? A. In the sheriff's office there. I think it's his office. I'm not sure.

Q. Well, is it a big room with a lot of windows, and four chairs on one side? A. Yes, it is.

Q. I think that's the sheriff's office. Leroy, how long did you stay in the sheriff's office? A. I don't know, sir.

Q. Well, did you stay there into that afternoon? A. After I went through that with Det. Smith, I began losing track of time. I couldn't say, sir.

Q. Some time that afternoon, Mr. Payne, were you given an opportunity to go to the washroom and wash up? A. That was the next day, sir.

Q. That was the next day? A. Yes, sir.

Q. Were you bruised? A. Yes, sir.

Q. Did you have a black eye? A. Both my eyes were black, sir.

Q. Did you have a cut under your right eye? A. Yes, sir.

[64] Q. Do you know how that cut was inflicted on you? A. Yes, sir.

Q. How? A. Well, before Det. Smith came in, another patrolman that was sitting there watching me, he was talking to me, and he said something and I told him that I always thought that a man was supposed to be innocent until he was proven guilty.

Q. Then what did he do? A. I guess when I said that it made him mad, and he took a swing at me, and he must have had a ring on his finger, because it cut me under the eye, sir.

Q. Now, Leroy, during this time, the first day, and I will call it the day of November 5th, 1962, did you admit to any police officer that you had anything to do with the shooting of officers Yost and Plummer? A. No, sir.

Q. Were you taken to the Municipal Court for the City of Benton Harbor that same evening? A. I think so, sir. I don't know.

Q. And were you there arraigned on the charge that you later pled guilty to? A. Yes, sir.

Q. Do you recall, Leroy, when you first admitted to police [65] officers that you had been involved in this incident? A. I think it was Tuesday or Wednesday. I know it was dark outside. I don't know if it was morning or afternoon.

Q. And was that Tuesday or Wednesday of the same week that we are talking about? A. Yes, sir.

Q. And can you tell the court and jury what day of the week the 5th of November was? A. Monday.

Q. So these incidents started to transpire early Monday morning, is that correct? A. Yes, sir.

Q. And you were arraigned, as near as you can remember, sometime that week? A. Yes, sir.

Q. And you finally admitted your part in this crime on what day? A. Tuesday, it might have been. I don't remember, sir.

Q. Did the officers question you, Mr. Payne, after you admitted your part in this crime, as to who your accomplice was? A. Yes, sir.

Q. And did you name any person? A. Yes, sir.

[66] Q. Whom did you name? A. Lonnie Bradford.

Q. Do you know whether or not Mr. Bradford was then arrested for investigation and brought to the county jail? A. I thought that he was already arrested, sir. I don't know when he was arrested.

Q. Did you see Mr. Bradford at the county jail? A. Yes, sir, I did.

Q. Can you tell us, Mr. Payne, approximately what day it was, after you had been arrested? A. Wednesday or Thursday.

Q. Wednesday or Thursday? Did you have any conversation with Mr. Bradford in the county jail on Wednesday or Thursday? A. Yes, sir.

Q. What was that conversation? A. I told him that I was sorry for he and I, and that I had told the police everything, and he asked me if I would call off someone else's name so that he could be released, and I told him that I couldn't take any more physical punishment, and he kept begging me to call someone else's name, so I

finally mentioned the name of John Perkins, I think it was.

Q. Did you really know a man by the name of John Perkins? [67] A. No, I didn't, sir.

Q. And you mentioned that name in the presence of Lonnie Bradford? A. Yes, sir.

Q. And then later on did you tell the officers that John Perkins was your accomplice? A. No, sir. I told them that John Perkins was a name that I had made up because Lonnie Bradford had pleaded with me to just name anybody so that he could get out of jail.

Q. And you say to the best of your recollection that was either Wednesday or Thursday of that week? A. Yes, sir.

Q. Now, Mr. Payne, after Wednesday or Thursday of that week, were you ever physically mistreated by any officer of the law? A. Yes, sir, after I mentioned this name.

Q. The name of John Perkins, you mean? A. Yes. I think it was the next day that Det. Smith and another detective—well, I was taken down to the interrogation room.

Q. And then they applied physical force to you? A. Yes, sir.

Q. Was the last time. A. Yes, sir.

[68] Q. Have you been physically mistreated in any way since the time that you just told us about, that Thursday of that week, I believe it was? A. No, sir.

Q. Are you presently under any fear of physical abuse? A. No, sir.

MR. McQUILLAN: Your Honor, I move that that be stricken from the record. We will let the facts indicate whether he is under any fear of abuse. At this time that's a conclusion of the witness.

THE COURT: He would be the only one to know. I don't know that it's material. Nobody else would know except him whether he is in fear of it or not. I will let the answer stand for whatever it may be worth at this point.

MR. LANGE: I have no further questions of this witness at this time, your honor.

(Recess taken.)

AFTER RECESS

CROSS-EXAMINATION

BY MR. McQUILLAN:

* * * * *

[70] Q. Now, witness Payne, you have already confessed that you attempted to murder Officer Yost in this affair, is that correct? A. Yes, sir.

Q. Now, in addition to this you have been in a little trouble before, haven't you? A. Yes, sir.

Q. Isn't it a fact, witness Payne, that you have admitted burglarizing the Eau Clair Fruit Exchange? A. Yes, sir.

Q. Isn't it a fact that you have admitted burglarizing the Blossom Lanes Bowling Alley? A. Yes.

Q. And Leonard's Super Market? A. Yes, sir.

Q. And the Woolworth store? A. Yes, sir.

Q. And Coon's Curve Standard Station? A. Yes, sir.

Q. And the United Distributors Company? A. Yes, sir.

Q. And Reinhart's Grocery? A. Yes, sir.

Q. Lakeshore Lanes Bowling Alley? [71] A. Yes, sir.

Q. And the Michigan Mart? A. Yes, sir.

Q. And the Babbitt Lumber Co? A. Yes, sir.

Q. And the Berrien Hills Country Club on more than one occasion? A. Yes, sir.

Q. And the M-139 Gulf Station? A. Yes, sir.

Q. And Nelson's Service Station? A. Yes, sir.

Q. The Airport Service Station? A. Yes, sir.

Q. The August Pohl Wreckers? A. Yes, sir.

Q. The Greenland Inn? A. Yes, sir.

Q. Territorial Auto Parts? A. Yes, sir.

Q. By-Rite Grocery? A. Yes, sir.

Q. Now, if my count is correct, Mr. Payne, that's 18 burglaries that you have admitted taking part in prior [72] to the shooting incident, is that correct? A. Yes, sir.

Q. As a matter of fact, you have burglarized more than 18, haven't you, in the past two years? A. Yes, sir.

Q. Can you estimate the number of burglaries you have been implicated in? A. No, sir, but it's more than 18. It seems so, sir.

Q. Isn't it an additional fact, witness Payne, that you have also admitted that on one occasion you pulled an armed robbery on the Dairy Queen Store in Benton Harbor? A. Yes, sir.

Q. In which one of the operators of that store was shot? A. Yes, sir.

Q. And haven't you also admitted attempting an armed robbery of the Cass Dairy Store? A. Yes, sir.

Q. Isn't it an additional fact, Mr. Payne, that prior to and at the time of the shooting you were using narcotics? A. Yes, sir.

Q. And as a matter of fact, the day of the shooting you were on narcotics, isn't that correct? A. Yes, sir.

* * * * *

[73] Q. Now, you state you are married. A. Yes, sir.

Q. Now, isn't it a fact that in addition to the other crimes I have named off that you have committed adultery? A. Yes, sir.

Q. With a woman in South Bend? A. No, sir.

Q. Where was she from? A. Chicago.

Q. On more than one occasion? A. Yes, sir.

Q. Was there more than one woman? A. No, sir.

Q. Didn't you ask the police in your discussions with them, [74] after your arrest, not to inform your wife of your adulterous conduct? A. I don't recall asking the police that, sir.

* * * * *

[76] Q. Now, isn't it a fact, Mr. Payne, that regardless of where you were that Sunday evening, that you were using narcotics? A. Yes, sir.

Q. Were you smoking marijuana cigarettes? A. Yes, sir.

Q. And after you claim you left Bradford's residence you say you went to the East End Bar in Benton Harbor? A. Yes.

Q. And you had some beer to drink there, didn't you? A. Yes, sir.

Q. And you say you went home at 10:00 from the bar? A. About that, sir.

Q. And isn't it true that after that time you also smoked some additional narcotics? [77] A. Yes, sir.

Q. Did you ever use heroin? A. No, sir.

Q. Marijuana? A. Yes, sir.

Q. Is that what you were smoking the night prior to the shooting? A. Yes, sir.

Q. Now, Mr. Payne, didn't you tell a different story as to [78] your whereabouts prior to your testimony in court here today? A. I don't understand you, sir.

Q. Isn't it true, Mr. Bradford, that you have previously stated that you did not return to Bradford's house until two in the morning, rather than midnight? A. Yes, sir.

Q. And to whom did you tell that? A. The police, sir.

Q. But you are changing your story here today? A. Yes.

Q. You are saying you went back at twelve o'clock? A. Yes, sir.

Q. And is it true that in a prior version of this incident you didn't even mention going to Souther Bend? A. Yes, sir.

Q. What's your answer? I say, you didn't mention that, or you didn't? A. This time. I have told the police prior to this time that we did go to South Bend, yes, sir.

Q. And you told a different story than that, didn't you, previously? Didn't you previously relate that instead of returning to Bradford's house at 12:00, and then going to South Bend, and then coming back, isn't it true, Mr. [79] Payne, that you have previously related that you didn't go over to Bradford's house until 2:00 in the morning, and that you went directly from his house and broke into the Robert Hall store? Didn't you tell that conflicting story prior to coming into court today? A. Yes, sir, I did, but–

Q. Just answer the question. You did, didn't you? A. Yes, sir.

Q. And you told that version as late as November 23rd of this year, did you not? A. I don't know the date, sir.

Q. To whom did you relate this version that I'm talking about? A. I don't know. I guess the last time that I was questioned, or the time before that. It's been quite some time that I did tell the police everything exactly.

* * * * *

[81] Q. Now, Mr. Payne, you admit you shot Officer Yost? A. Yes, sir.

Q. And you also admit that you shot Officer Plummer, didn't you? A. Yes, sir.

Q. What kind of a gun were you using? A. 32.20, sir.

Q. I show you want's been marked for identification as people's exhibit 4, and ask if you can identify that. A. Yes, sir.

Q. What is it? A. 32.20 revolver.

Q. Is that the weapon that you used to shoot Officer Yost and Officer Plummer? A. Yes, sir.

Q. Do you know how many times you fired that pistol on that evening? A. No, sir.

Q. Is that a six-shot pistol? A. Yes, sir.

[82] Q. Did you empty it? A. I don't know, sir.

Q. How many times did you shoot Officer Yost? A. I don't know, sir.

Q. Four? Could it have been four? A. I was told later on it was four, but I don't know.

Q. How many times did you shoot Plummer? A. I don't know.

Q. Could it have been twice? A. I don't know.

Q. Is it possible? A. I guess so.

* * * * *

[83] Q. Now, Mr. Payne, you said that you were arrested at approximately 4:30 A.M. that Monday morning, November the 5th, is that correct? A. Yes, sir.

Q. And you were arrested at your home? A. Yes, sir.

Q. And you said that from your home you went to the Benton Harbor police station? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. In a police car? A. Yes, sir.

Q. And were you handcuffed? A. Yes, sir.

Q. And in what fashion were you handcuffed? A. My hands were behind me.

Q. Behind your back? A. Yes, sir.

Q. When you got to the police station, were you immediately taken into the station? [84] A. Yes, sir.

Q. Now, prior to going in the police station, weren't there some officers standing around your car? A. I don't remember seeing any officers standing around the car.

Q. Did anybody call you any names? A. Yes, sir.

Q. Who? A. Some policeman there.

Q. Was that before you got out of the car? A. That was after they had taken me to see Det. Yost.

Q. Now, from the police station that first time, the Benton Harbor police station, were you taken up to Mercy Hospital? A. Yes, sir.

Q. Now, when you were taken to the hospital, Yost identified you, right? A. He said that he thought I looked like the fellow that shot him.

Q. Were you then returned to the Benton Harbor police station? A. Right.

Q. When you were returned to the police station, was there anything wrong with your face? A. No, sir.

Q. Anything wrong with any part of your body? A. No, sir.

Q. Were you then taken into the Benton Harbor police station to the detectives' room? A. Yes, sir.

Q. Before being taken into the police station, were you called any names? A. Well, after I was—after I left the hospital and was waiting to be taken back to the police station, I was, sir.

Q. That was out at the hospital? A. Yes, sir.

Q. Were there any police officers around the car? A. Yes, sir.

Q. And did anybody say anything to you? A. Yes, sir. They called me names.

Q. What did they call you? A. "Dirty bastard," "nigger," and told one of the policemen guarding me to take the cuffs off of me and push me out of the car and leave me with them and they could shoot me.

Q. Did that make you fearful? A. Yes, sir.

Q. Then you were taken in the police station? A. I was taken to the police station.

Q. And you were assaulted, as you have previously described? [86] A. Yes, sir.

Q. And how long were you in the detectives' room at that time? Do you remember? A. No, sir.

Q. Isn't it true that Det. Matt Casserly had to pull Lt. Smith off of you? A. Yes, sir.

Q. And you were then taken back to the Berrien County sheriff's office, is that right? A. Yes, sir.

Q. Now, you said you were abused at that time by the officers. A. Yes, sir.

Q. Will you describe to the court and jury, if you can, just what they did to you? A. I was sitting in a chair, and was handcuffed, and—

Q. Your hands were handcuffed behind your back? A. Yes, sir. No, they was in front of me at the time, and they were pretty tight, and the officers could see this, and they told me if I would start to talk they would take the handcuffs off. I wouldn't say anything, so they took them off anyway, and I was sitting in the chair with my arms like this on the armrests, and the officers questioning me, and I wouldn't say anything because of [87] the way they had treated me.

Q. What did they do to you? A. They grabbed my arm.

Q. Do you who they were? Can you identify them? A. Yes, I know the officers.

Q. Who were they? A. I don't know their names, but I know them when I see them.

Q. Now, if you would please describe to the court and jury what they did to you. A. At that time one of the officers grabbed my thumb, and the other one grabbed my other arm, and started twisting, and twisted so much that I couldn't sit in the chair, and I fell out.

Q. Twisting your fingers? A. My thumb back, at the time, until it popped. I thought it was broken, and then he started to twist my index finger and trying to get me to talk.

Q. Did anybody kick you? A. Only Det. Smith, when he was—when I was over to Benton Harbor.

Q. When you were at the Benton Harbor station? A. Yes.

Q. Where did he kick you, if you know? [88] A. In the body.

Q. Whereabouts on the body? A. Around the waist and the buttocks.

Q. Did he kick you in the crotch? A. No, sir. I tried to protect myself as much as I could by curling up in a ball.

Q. Now, returning to the sheriff's department, how long did this torture that you have described continue? A. One of them kept hollering for me to get back in the chair, and they were still twisting my finger, and then I—then they got me back in the chair.

Q. They fianlly quit? A. I don't know how long they did this. I was able to get back in the chair.

Q. You don't have any idea how long this went on? A. No, sir. I don't know for sure.

Q. Well now, after they stopped that, what did they do with you? A. I was taken into the next room, and the questioning was continued.

Q. How long did they continue questioning you? A. Until I confessed to these—

Q. That was the following morning, Tuesday morning? A. I don't know the exact time, sir.

[89] Q. This questioning continued, if I understand you correctly, all day Monday into the night, until into the morning on Tuesday? A. Some time Tuesday, sir. I don't know.

Q. Did they give you anything to eat on Monday? A. No, sir.

Q. Did they give you anything to drink? A. No, sir.

Q. Isn't it a fact that they told you they would give you something to eat and drink if you told them—if you told the police whether or not you shot the officers, and who your accomplice was? A. I was told I could have a drink of water if I talked, yes, sir.

Q. And you said that you were taken over to Benton Harbor to be arraigned at approximately midnight Monday? A. I know it was dark outside. I don't know what time it was.

Q. So that we get it straight here, you were picked up early Monday morning, and you were held all day Monday and questioned, and then was it Monday night that you were taken over to Benton Harbor to be arraigned before the judge? A. I don't know. It could have been Monday or Tuesday [90] night.

Q. Was that before you say you confessed? A. I hadn't confessed at the time I was arraigned.

Q. At the time you were arraigned, you hadn't said anything as to who was involved, right? A. Yes, sir.

Q. And isn't it a fact that you were arraigned at approximately ten o'clock Monday? A. I know it was late at night, sir.

Q. Late at night Monday evening? A. Yes, sir.

Q. All right. After they took you over to be arraigned, where did they take you then? Back to the sheriff's department? A. Yes.

Q. What then? A. I was questioned some more.

Q. And how long did that questioning continue? A. Until I confessed.

Q. And until you implicated Mr. Bradford, is that correct? A. Well, until I told everything, sir.

Q. And that was at approximately five o'clock A.M. Tuesday morning? A. I don't know the time, sir.

[91] Now, all this time, that is, from the time you were arrested until the time you confessed, did you have any sleep? A. No, sir.

Q. They wouldn't let you sleep? A. No, sir.

Q. Were you standing up most of the time? A. Part of the time, sir.

Q. I want to get this one point clear, Mr. Payne. Did you implicate Mr. Bradford at the same time that you confessed, as being involved? A. Yes, sir.

Q. All right, now, after that what happened? A. After I confessed?

Q. Yes. A. I was put in a cell.

Q. Do you know what day that was? A. No, sir.

Q. How long did you stay in your cell? A. I don't know, sir.

Q. Did they later take you out of your cell? A. Yes, sir.

Q. When was that? A. Some time later on. I don't know if it was daylight or [92] not.

Q. You don't know if it was day or night? A. Not right now, sir, I don't know, sir.

Q. How long were you in your cell, do you know, before they took you out again? A. I went to sleep, sir, and no sooner was I in the cell when I was woke up.

Q. They came back and got you a short time later? A. I don't know how long it was.

Q. What did they do with you then? A. I was questioned by some state troopers. I was put in the interrogation room and questioned by some state troopers.

Q. What did they question you about? A. They questioned me about the shooting.

Q. Well, could you be more specific, if you know? A. Well, they told me that they weren't involved in the case.

Q. That what? A. That they weren't involved in the case, and that they just wanted me to tell them what happened so they would know for themselves.

Q. This was after you implicated Bradford? A. Yes, sir.

Q. What, if anything, else happened when the state police [93] were in the room with you? A. I told the state police that I had told the sheriff everything that I knew, and that I didn't know any more to tell them than what I had said, and they told me that was all right, that they just wanted me to tell them anyway, and I was sitting there, and I didn't know what to say or anything, and they told me if I didn't start talking that they were going to squeeze my groin, my sack, until I passed out.

Q. You mean your private parts? A. Yes. They told me they'd do this three times, if I didn't start talking. I didn't know what they wanted me to talk about, since I'd already told the sheriff everything, and so they—I was just sitting there and they told me to stand up, and I stood up, and one of them grabbed me around my arm and twisted it behind me, and threw me across the desk, and the other one reached for my privates and started to squeezing and told me I'd better start talking right then and there.

Q. One of those state troopers grabbed you in the private parts and squeezed you there? A. Yes.

Q. What happened after that? A. I just told them the same thing that I had told the [94] sheriff.

Q. How long did they keep you in there at that time? A. I don't know, sir.

Q. And what happened to you after that? A. After I told them everything, one of them walked out of the room and the other one was sitting there talking to me. He told me they didn't want to hurt me but they just wanted to know everything that happened, and that was

all there was to it, and while he was talking to me I heard a recording of everything that I said to them played back, and afterwards I was taken back to my cell.

Q. All right. Now, do you know what day of the week this was? A. No, sir, but I do remember it was dark.

Q. What happened after you were taken back to your cell, witness? A. I was left there.

Q. And for how long? A. I don't know, sir.

Q. When was the next time they took you out of your cell? A. When I was taken down to talk to Lonnie Bradford at the sheriff's department.

Q. Do you know what day of the week that was? A. No, sir.

[95] Q. You have no idea? A. I guess it was Wednesday or Thursday.

Q. Let's digress one minute here, witness. Prior to the time that you implicated Bradford, isn't it true that you saw Bradford over in the sheriff's office? A. Yes. This is the time I was speaking of, but I had confessed to everything and told everything.

Q. You claim that was the first time you saw Bradford? A. Since he was arrested?

Q. Yes. A. Yes.

Q. You knew Bradford before this happened, didn't you? A. Yes, sir.

Q. You said you had known him about five months prior to this time? A. It could be more or less; around there, sir.

Q. And in other words you are saying you knew Bradford about two months prior to this shooting? A. About that. I don't know, sir.

Q. How long had you known this Charlie Hawkins, this fellow that was pulling all these burglaries with you? You knew him quite a while, didn't you? A. Well, I went to school with him.

Q. You went to high school with him? [96] A. Yes, sir.

Q. He was a pretty good friend of yours? A. Not at the time, sir, no.

Q. All right now, what happened after this incident when you claim you were talking with Bradford at the police station? Did the police mistreat you at any time after that? A. Yes, sir.

Q. When was that? A. The next day.

Q. That would be on a Thursday? A. I guess so, sir. I'm not sure.

Q. What heppened then? A. That was when Det. Smith and the other detective came in and questioned me again.

Q. Where was this? A. In the interrogation room in the county jail building.

Q. Tell the court and jury if you can what happened at that time. A. I was sitting on a couch that they have there, and the two detectives came in and started questioning me and told me that I was going to tell the truth and that they didn't want any lies told, and I told them that I had already told the truth, and they said–I guess they [97] didn't believe me–and one grabbed me and held me down while the other grabbed my privates again and started squeezing, and I started hollering that I had told the truth.

Q. All right. What happened after that? A. Well, they thought they–they said something about the name Perkins, the name that I had mentioned while I was with Lonnie Bradford, and I told them the only reason I had mentioned the name to Lonnie Bradford was that he kept asking me to just call anybody's name so he could get out again.

Q. Incidentally, where did this conversation take place? A. In the interrogation room.

Q. And weren't you aware of the fact that that interrogation room had been bugged, so to speak, so that people could hear your conversation outside the room? A. Yes, sir.

Q. And you were aware of that when you were talking with Bradford? A. Yes.

Q. And did Bradford tell you he was aware of that? A. Yes.

Q. And you still claim that Bradford at that time was telling you to blame somebody else? [98] A. He didn't speak orally sir. I mean—well, he talked, but in a low tone, and while, in a way that they couldn't understand.

Q. But you knew the room was bugged. A. Yes.

Q. You still claim you talked about that in that room? A. Yes, sir.

Q. All right. After the last meeting that you described, which was, as I recall, was on a Thursday— A. I guess so, sir.

Q. What happened after that? A. I told them the reason that I had called the name of John Perkins, and—

Q. And you were beat up, as you just described, right? A. I was telling them that I had told the truth, and the reason why—the only reason I had called that name was that he had asked me to.

Q. All right. After that meeting were you taken back to your cell? A. Yes, sir.

Q. And your claim is that you hadn't been beat up since then? A. Yes, sir.

Q. And isn't it also true that since then you haven't named [99] anybody else but Bradford? A. Yes, sir.

Q. Now, you have been in the custody of the sheriff department since the arrest, correct? A. Yes, sir.

Q. Now, do you remember when you were taken over to Benton Harbor to court for an arraignment? And this,

I believe, was in the early part of the week, late at night, as you said? Do you remember that occasion? A. Yes, sir.

Q. Now, prior to your going upstairs to be arraigned in the Benton Harbor court building, did you have any conversation with a Mr. Lake from the prosecutor's office? A. Yes, sir.

Q. And where did that take place? A. In the Benton Harbor detectives' office.

Q. And who was present? A. He and I were present.

Q. Will you tell the court and jury as closely as you can what was said by Mr. Lake on that occasion? A. Well, he told me I'd better start telling the truth, and that if I tried to fight this thing that he was going to see that my wife was prosecuted for perjury [100] and that our children were taken away.

Q. And that was before you confessed to this incident? A. Yes.

Q. And it was before you implicated Bradford? A. Yes.

Q. Now, witness, isn't it true that you told the police on at least one occasion, and possibly more, that you had never signed a statement against Bradford or never testified against him? A. I don't recall saying that, sir.

Q. Is it possible you could have said it? A. I think I remember saying that I don't wish to testify against Bradford, but I don't wish to testify against anyone.

Q. You told the police that you didn't wish to testify against Bradford, is that correct? A. Yes, sir.

Q. And isn't it also true that as late as November 23rd, on the occasion when you gave a statement to your attorney, that you told him you didn't wish to testify against Bradford? A. Yes, sir.

Q. Now, isn't it true that—first, I want to pinpoint something here, witness. I am referring to the statement

[101] that you made to your attorney, which was transcribed by the lady that was present, and that you said you read. Do you have the statement in mind? A. Yes.

Q. And that's the same statement that you gave your lawyer written permission to show to me, is that correct? A. Yes, sir.

Q. And isn't it true, Mr. Payne, that in that statement, when it was suggested to you that you might draw some leniency in your sentence if you testified against Bradford, that you then indicated you would testify against him? A. I said I didn't know, sir.

Q. Do you know where that statement is? Does your lawyer have it? A. No, I don't, sir.

Q. I am asking you directly, isn't it true that one of your reasons for being up here and testifying is that you hope to get a lighter sentence? A. No, sir.

Q. You are saying that that is not true? A. Yes, sir.

Q. That you never made a statement to that effect? A. If I could clarify something–

[102] Q. I am asking you to answer the question that I'm asking. You deny that you ever made a statement to that effect? A. Yes, sir.

Q. You deny it? A. Yes, sir. If I could explain something. When I was asked–

Q. I am not asking you to explain. You'll have a chance to do that. I am asking you to answer my question. A. Yes, sir.

Q. You haven't answered the question. A. No, sir.

Q. How long ago did you plead guilty? A. I don't know the exact date.

Q. Is it over a month ago? A. I guess so, I don't know.

MR. MC QUILLAN: That's all I have, your honor.

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REDIRECT EXAMINATION

By Mr. Lange:

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[104] Q. Now, Mr. Payne, Mr. McQuillan, on cross-examination, claims that there was some differences or discrepancies in these stories. Can you explain any of these alleged discrepancies? A. Yes, sir.

Q. Will you do so, please? A. When I first confessed, it was more or less under a pressure basis, and I didn't want to say any more than I had to, but afterwards things have changed, at least my [105] outlook on life has, and I feel that in order for me to make anything of myself I have to face up to what I have done and tell the police everything that I know so that I can more or less clear myself with my past.

Q. And did you, Mr. Payne, as a result of this changed outlook on life, reconsider the stories? Did you think about them? A. I am only telling the truth, sir. I haven't added anything to it or taken anything away.

Q. You are just telling more details than you told previously, is that correct? A. Yes, sir.

* * * * *

[110] Q. Now, Leroy, just to get this story straight, when you left—were you left alone at any time after your arrest until the time of your arraignment? A. I don't think so, sir.

Q. You don't think so? A. No, sir.

Q. Now, you had had no sleep the night before, naturally? A. That's right, sir.

Q. Do you recall when you first went to sleep? Was it after your arraignment? A. After.

Q. After you had been to court? A. It was after I had given a confession.

[111] Q. Now, just a few questions about this incident involving Mr. Lake. This took place at the Benton Harbor Police Station? A. Yes, sir.

Q. And it was prior to your arraignment? A. Yes, sir.

Q. Do you recall whether or not you asked to talk to him? A. Yes, sir, I did.

Q. You asked to talk to him? A. Yes, sir.

Q. What was your reason in making that request? A. I can't recall at the time.

Q. Well, if you can't recall, that's all right. But you did ask to talk to Mr. Lake. A. Yes, sir.

Q. And then he came into the room and you and he talked alone, is that correct? A. Yes, sir.

Q. Do you recall that converstion? As near as you can reconstruct it. A. No, sir, just parts; a little of it.

Q. Didn't he tell you that we had a good case against you? A. Yes, sir.

Q. And what was said about your wife? [12] A. Well, I hadn't said anything, I don't think, for a while, and Mr. Lake told me that they had a good case against me, and that if I tried to fight this case my wife would be prosecuted for perjury.

Q. You knew what perjury meant, didn't you? A. Yes.

Q. What did you think perjury meant? A. Lying.

* * * * *

RECROSS-EXAMINATION

By Mr. McQuillan:

Q. You say the day after you were picked up your pastor [113] came over to see you? A. About that time, yes.

* * * * *

Q. You asked for a Bible after you did this, too, didn't you? A. Yes, sir.

Q. It was just a little late, wasn't it? A. Yes, sir.
Q. You are an admitted burglar? A. Yes.
Q. And you are an admitted robber? A. Yes.
[114] Q. And an attempted murderer? A. Yes, sir.
Q. And an adulterer? A. Yes, sir.

* * * * *

REDIRECT EXAMINATION

By Mr. Lange:

Q. Mr. Payne, when you first told this story in court of the mistreatment by police officers, did you and I [115] discuss that matter in the presence of the court reporter? A. Yes, sir.

Q. And at that time did I explain to you that under the law you had a right to sign a complaint against any officer you desired? A. Yes, sir.

Q. And what did you tell me? A. I told you I had to think about it.

Q. And did I then tell you that any time you wanted to sign the complaint to let me know? A. Yes, sir.

Q. Have you ever let me know? A. No, sir.

* * * * *

[138] MR. MC QUILLAN: The motion is this: I respectfully move that the court strike all of Payne's testimony from the record, for the reason that his testimony is so patently unbelievable, in view of the circumstances surrounding his detention, and how they acquired this information, that I think as a matter of law it should be stricken from the record.

THE COURT: I will deny your motion without hearing an argument.

MR. MC QUILLAN: I can't argue it, in that case?

THE COURT: No.

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[176] CHARLES PLUMMER

A witness called by and in behalf of the people, being first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. Lange:

Q. Will you state your full name, please? A. Charles Plummer.

Q. And where do you live, Mr. Plummer? A. Route 3, Coloma.

Q. And what is your regular occupation? A. Technical consultant with the Heath Company in St. Joe.

Q. And are you also a deputy sheriff of this county? A. Right.

Q. That would be one of the special deputies? A. Right.

* * * * *

[178] Q. Then what happened? A. At that point Det. Yost started to pull up beside the car, or up like you would begin to pass, and he sounded his siren and turn the car's spotlight on the car in front of us. I had a hand-held spotlight with a red lens that I flashed back and forth from my side of the car in the front seat. The car pulled over to the curb.

Q. After the car pulled over to the curb, what position was your squad car in with relation to the rear of this parked Pontiac? A. Directly behind it.

Q. What happened then, Mr. Plummer? A. I got out of the right side of the car. Det. Yost got out on the left side. We started to walk up towards this car, one on either side. I approached the car from the right side as

you are looking at it from the [179] rear, or the passenger side.

Q. Were you carrying anything as you approached this car at the right side? A. Yes, I had a five-cell flashlight with me.

Q. Did you have it turned on? A. Yes.

Q. And then what happened? A. As I approached the door of the car on the passenger's side I noticed a pile of things in the back seat of the car, and then just as I started to reach for the door it opened.

Q. Then what happened? A. I turned the light inside the car and bent my head down slightly, and this subject in the car fired a gun at me.

Q. There were two men in the car? A. Right.

Q. Which man fired the gun at you? A. The defendant, Bradford.

Q. And what side of the motor vehicle was he on? A. He was sitting in the passenger side of the Pontiac.

Q. And did this bullet strike you? A. In the right shoulder?

Q. What happened after the bullet struck you, Mr. Plummer? A. It spun me around. I stumbled or got myself to the rear [180] of the car, by the right rear fender, trying to get some cover to keep from being shot again. When I was laying on the ground I looked up, and the driver of the car came back and stood beside the left rear fender and pointed a gun at me and fired.

Q. As the driver of the automobile fired at you, what did you do, if anything? A. I had my own gun in my hand by that time. I raised it up in his face and pulled the trigger, and the first shell misfired.

Q. Didn't go off? A. That's right.

Q. Do you know who the driver of that automobile was? A. Yes.

Q. Who was that? A. Leroy Payne.

Q. Do you know who the passenger in that automobile was? A. Yes, it was the defendant?

Q. That is the defendant seated here in court? A. That's right.

Q. Do you know, Mr. Plummer, how many shots were fired by the defendant on that occasion? A. I know that the defendant fired one shot at me. I don't know how many more he fired.

[181] Q. If any? A. If any. I didn't count any more after the first one.

Q. And this bullet struck you in the shoulder? A. Yes, in the right shoulder.

Q. Can you estimate to the court and jury approximately how far you and the defendant were apart when this shot was fired? A. Approximately—our faces were approximately two feet apart, I imagine, as I stooped over to look in the car.

Q. Immediately after your gun misfired, what did you do? A. Well, as my gun misfired, his fired, and the shot hit me in the left side, and as soon as I could I pulled the trigger again. That time the gun fired.

Q. And what were you aiming at, if you remember? A. I was trying to aim at the driver of the car.

Q. Did you then radio the sheriff's office or any police agency for aid? A. Yes. As I fired the second time, or attempted to fire the second time, the driver stepped back into his car and started to drive away. While laying on the ground I fired four more shots at the car as it pulled away.

Q. You believe you may have struck that automobile as it was being driven away? A. I sure aimed at it. I believe I did.

[182] Q. Then did you call the police department for help? A. Well, the next thing that actually happened was the subject's car stopped some distance after it started up. I would say 50 or 60 feet. My gun was empty. I got up off the pavement and ran behind the patrol car, where I could see Det. Yost laying beside the left fender, and I started to reload. Before I could get my gun reloaded–I had put in two shells, and I watched the driver of the car walk back, or run back–hurry back toward us, and about half way back I knew I couldn.t get my gun loaded, and I hollored to Vic to hand me his gun and I would get him when he got back to the headlights.

Q. Then what happened? A. He turned, stopped and looked for a second. He was staring into our headlights. He turned and ran back to his car and started to drive away. By then I had finished reloading and I got into the patrol car.

Q. Did you follow him? A. I followed him about three blocks.

Q. And you subsequently lost him? A. Yes.

* * * * *

[184] Q. This was the early morning of the 5th of November of 1962? A. Right.

Q. And you had some surgical treatment that day? A. I believe it was about noon that day that they operated.

* * * * *

[186] Q. Now, Mr. Plummer, when were you discharged from the hospital? A. Well, the shooting was on the 5th, which was a Monday morning, and I was discharged the following Monday in the afternoon, after lunch.

Q. That would have been on the 12th? A. I believe so, if that's seven or eight days.

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[188] CROSS-EXAMINATION

By Mr. McQuillan:

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[192] Q. Now, did you see your assailant after that time? A. After the shooting?

Q. After the shot was fired, yes. A. Not after the shot was fired.

Q. You saw the other man, Payne? He came over and shot you, too? A. That's right. I saw him after that.

Q. Now, you were taken—do you have any idea as to what time you arrived at the hospital for treatment? A. Some time during—something like that is kind of hard to judge. I would say from the time I got back to Victor it was a minute or two before the ambulance arrived, because I barely had time to get out of the car and walk over to him and asked him how he was getting along. He couldn't get up, and I saw the ambulance light coming. I moved the car out of the road, over to the curb then, and I would say from that point, not over ten minutes that we were in the emergency room. We were about a block and a half from there.

Q. You stayed in the hospital just about a week? A. Seven or eight days. From early Monday morning until the middle of Monday noon following.

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(DEFENSE CASE:) [240]

DEWEY HANES

A witness called by and on behalf of the defendant, being first duly sworn, was examined and testified on his oath as follows:

[241] DIRECT EXAMINATION

By Mr. McQuillan:

Q. Will you state your name, please? A. Dewey Hanes.

Q. And where do you live? A. Lansing, Michigan.

Q. By whom are you employed? A. The Lansing State Journal.

Q. And how long have you been employed at that place? A. About three months.

Q. Now, where were you working on or about November 4th, 5th, and 6th, 1962? A. In Benton Harbor.

Q. And by whom were you employed at that time? A. The News Palladium.

Q. In what capacity? A. Reporter.

Q. Now, do you recall the early morning hours of November the 5th, 1962? A. Yes.

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[245] Q. Now, do you know Leroy Payne? A. I have seen him.

Q. And did you see him after this shooting incident? A. Yes.

MR. LANGE: I think it's time for the jury to be excused, your honor.

(Whereupon the jury leaves the courtroom.)

MR. LANGE: Well, if the court please, we will show you the photograph. I am sure the court has seen a blown-up copy of this in the press shortly after this incident happened. I don't believe that this particular photograph has any materiality to [246] any issue here. I agree with at least what I figure was the thinking of the court as to certain remarks made this morning outside the presence of the jury, that we have gone quite far afield regarding what happened to Leroy Payne. As to what effect this might have on his credibility as a witness I will abide by the ruling of the court, naturally, but I don't see

how this has any material issue here. This matter has been fully testified to by Leroy Payne in the greatest of detail without any objection by anyone, and I feel this is no different than the rule that you don't show—don't ordinarily show photographs of a dead or mutilated body to a jury because it tends to inflame them. That's the only basis for my objection.

THE COURT: We certainly have covered it, Mr. McQuillan, to the nth degree. The witness has admitted he was beaten up. He has told about being tortured. It goes a lot further than the picture does. There has been no denial of it in the people's case. It seems to me like this is overburdening the animal.

(Further colloquy between court and counsel reported, but not transcribed.)

THE COURT: Why don't you have the [247] witness testify to the picture, then and put the picture in.

MR. MC QUILLAN: Because I've got a right to have this jury hear every bit of evidence that has a bearing upon that witness' credibility.

THE COURT: Not every bit of it; not something that's cumulative to the nth degree.

MR. MC QUILLAN: I would like to then submit an offer of proof.

THE COURT: You may then submit an offer of proof.

Q. (By Mr. McQuillan, continuing) Mr. Hanes, you testified that you know Leroy Payne. A. I have seen him.

Q. You saw him after this shooting incident first arose? A. Yes.

Q. Where did you see him? A. Well, the only place I can remember having seen him was when he was arraigned in municipal court, but I think I saw him earlier in the jail, too.

Q. Do you remember what time that was when you saw him in municipal court? A. Yes, it was shortly before midnight.

Q. On Monday, November 5th? [248] A. Well, I don't remember the date.

Q. Now, I show you this photograph, which has been marked for identification as defendant's exhibit D, and I ask you if you can identify the individual shown on that photograph. A. That is Payne.

Q. And is that photograph—does that photograph present a full, true, and correct representation of Mr. Payne's appearance as you saw him in the municipal court that evening, as you testified to? A. Well, he looked a little better than that, but that's close enough.

Q. Does that show how he appeared that evening? A. Well, he was cleaned up, but his eye was puffed like that.

Q. Did you ever see him when he appeared as he does in this photograph? A. No, not exactly like that; reasonably substantially like that.

Q. Where was that? A. In the court when he appeared for arraignment.

Q. In Benton Harbor? A. Yes.

MR. MC QUILLAN: I renew my motion, your honor, that it be admitted in evidence.

THE COURT: I will deny it on the ground that it's highly inflamatory, and it's not necessary for the protection of the defendant or for proving anything in connection with the credibility of the witness Payne.

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[293] Mr. MC QUILLAN: I would like to recall Leroy Payne.

LEROY PAYNE

A witness having been previously sworn, resumed the stand and testified further as follows:

RECROSS EXAMINATION

By Mr. McQuillan:

Q. Mr. Payne, you testified earlier that you pled guilty to the charge of assaulting Officer Yost with intent to murder. A. Yes, sir.

Q. Are there any other criminal charges pending against you at the moment? A. Yes, there is.

Q. What are they? A. Assault with intent to kill, and breaking and entering.

Q. Officer Plummer? A. Yes, sir.

Q. And is there a burglary charge pending? A. Yes.

Q. Has there ever been any charges brought against you in connection with all these burglaries that you admitted? [294] A. No.

Q. Have there ever been any criminal charges brought against you with respect to the two armed charges you admitted? A. No.

MR. MC QUILLAN: That's all.

MR. LANGE: I have no questions of this witness at this time.

(Witness excused.)

MR. MC QUILLAN: The defense rests, your honor.

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